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IN THE

Supreme Court of the United States

OCTOBER TERM 1986

ALLAN R. BRAKKE and MARK J. SELLNER,
Petitioners

v.

DEPARTMENT OF TRANSPORTATION, AND
FEDERAL AVIATION ADMINISTRATION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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EDITOR'S NOTE

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QUESTION PRESENTED

1. Whether the decisions of the Court of Appeals and the Merit Systems Protection Board in finding that Mr. Brakke and Mr. Sellner were participants in a strike against the Federal Aviation Administration, were clearly erroneous, arbitrary and capricious, and without any substantial basis in law or fact.

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DEPARTMENT OF TRANSPORTATION, AND
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioners, Allan R. Brakke and Mark J. Sellner, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals reviewing the decision of the Merit System's Protection Board (App. A, p. 1) is unreported. The decision of the Merit Systems Protection Board (App. D, p. 12) is also unreported.

JURISDICTION

The judgment of the Court of Appeals (App. B, p. 9) was entered on April 21, 1986. A Petition for Rehearing, timely filed, was denied on May 28, 1986 (App. C, p. 10). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statute establishing the grounds upon which employment action may be taken against a federal employee, 5 U.S.C. §7513(a), provides in pertinent part:

> §7513. *Cause and Procedure.*
>
> (a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

The statute forbidding a federal employee from engaging in a strike against the government of the United States, 5 U.S.C. §7311, provides in pertinent part:

> §7311. *Loyalty and Striking.*
>
> An individual may not accept or hold a position in the government of the United States or the government of the District of Columbia if he—
>
> * * *
>
> (3) participates in a strike, or asserts the right to strike, against the government of the United States or the government of the District of Columbia; or
>
> (4) is a member of an organization of employees of the government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the government of the United States or the government of the District of Columbia.

The statute establishing the burden of proof necessary to sustain an agency's employment action against an employee, 5 U.S.C. §7701(c)(1), provides in pertinent part:

§7701. *Appellate Procedures.*

* * *

(c)(1) Subject to Paragraph (2) of this section, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(A) in the case of an action based on unacceptable performance described in §4303 of this title, is supported by substantial evidence, or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding Paragraph (1), the agency's decision may not be sustained under subsection (B) of this section if the employee or applicant for employment—

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in §2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

The statute establishing the standard for judicial review of agency action against an employee, 5 U.S.C. §7703(c), provides in pertinent part:

§7703. *Judicial review of decisions of the Merit System's Protection Board.*

* * *

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the Court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule or regulation having been followed;

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

STATEMENT

This case represents the last step in petitioners' efforts to be reinstated as air traffic controllers, a position they were removed from as a result of the Professional Air Traffic Controllers Organization (PATCO) strike against the Federal Aviation Administration in 1981. Mr. Brakke and Mr. Sellner were employed prior to the strike at the Minneapolis Air Route Traffic Control Center (ARTCC) in Farmington, Minnesota. Mr. Brakke was employed as an air traffic control specialist, and Mr. Sellner as a developmental air traffic control specialist. On August 8 and August 7, 1981, respectively, Mr. Brakke and Mr. Sellner were removed from service by their facility chief, Michael Ciancanelli, for allegedly participating in the PATCO strike against the United States Government. Mr. Brakke and Mr. Sellner rigorously denied the basis of their termination, each claiming that they were on leave of absence at the time of their removal from service and therefore justified in not reporting to work. By decision dated December 22, 1982, the presiding official of the Merit System's Protection Board (MSPB), hearing officer Victor Russell, sustained Mr. Brakke's and Mr. Sellner's termination. Messrs. Brakke's and Sellner's petition to the MSPB for a review of the hearing

officer's decision was denied and they appealed to the Federal Circuit Court of Appeals. On April 21, 1986, the Federal Circuit Court of Appeals by a three-judge panel affirmed the decision of MSPB removing Brakke and Sellner from service in the FAA. On May 28, 1986, the Federal Circuit denied Brakke's and Sellner's petition for rehearing. Messrs. Brakke and Sellner now request a Petition for Certiorari to issue to review the Federal Circuit's affirmance of the patently wrong and unjust action of the MSPB.

REASON FOR GRANTING THE WRIT

1. The decisions of the Court of Appeals in affirming the Merit System's Protection Board and of the Merit System's Protection Board in finding that Messrs. Brakke and Sellner were participants in a strike by PATCO, were clearly erroneous and without any substantial basis in law or fact.

Petitioners approach this Court with a full awareness of the heavy burden imposed on those seeking a Petition for Certiorari. This case does not raise any constitutional issues, nor does it involve a conflict between the different circuits of the federal appellate courts, or between a federal court of appeals and a state court of last resort over a federal question. The basis for this appeal is that the Federal Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and has sanctioned such a departure by the Merit System's Protection Board, as to justify this Court to exercise its powers of supervision. A showing of "special and important reasons" for granting the Writ in this type of case obviously requires a showing of such fundamental error in the decision of the appellate court and in the action

of the federal agency as to literally cry out for correction by this Court. Such is the nature of the claims of these petitioners. Messrs. Brakke and Sellner have been wrongfully dismissed from their service with the FAA, and the Merit Systems Protection Board and the Federal Circuit Court have turned deaf ears upon their pleas for reason, justice, consistency and fairness. These two men were removed from service while on uncancelled annual leave and subsequently terminated for participating in the strike *after* they had been removed from service. Rather than evaluating the specific, objective facts of their individual cases, the MSPB has painted them with the broad brush of illegal union action and has ignored the particularized nature of their claims while allowing the reinstatement of all others identically situated. The Federal Circuit Court of Appeals, ignoring the standards it established for a showing of strike participation, affirmed a clear miscarriage of justice by the MSPB, and this error requires correction by this Court.

The basis for this petition for certiorari is a narrow question of law which was never directly considered by the court below and which, by implication therefore, was decided incorrectly. Specifically Messrs. Brakke and Sellner request that this Court review the question of whether, as a matter of law, as well as logic and simple common sense, they could be terminated for participating in the strike *after* they had already been removed from service by the erroneous actions of the FAA.

Some background is necessary to understand the context of the petitioners' status in this well publicized and unfortunate dispute. In July, 1981, PATCO declared a strike against the Federal Aviation Administration to commence on August 3, 1981. On August 3, 1981, President Reagan in an address to

the nation declared that the strike was illegal and that those air traffic controllers who did not report to work within 48 hours of his pronouncement would be terminated. By this pronouncement, President Reagan effectively gave the controllers a two-day grace period within which to end their job action and return to work. All of those controllers who reported to work for their next regularly scheduled shift during or after the moratorium period (which ended 11:00 a.m. E.D.T. on August 5, 1981), regardless of whether they participated in the strike prior to the deadline, were reinstated. Any controller who failed to report for his first scheduled shift after the moratorium period was terminated.

Mr. Brakke did not report to work for August 3 and 4, 1981 during the presidential moratorium. From August 5, 1981 until August 10, 1981, Mr. Brakke had approved annual leave and regular days off. Under the presidential moratorium, Mr. Brakke was required to report for his first regularly scheduled shift on August 10, 1981, at 1:30 p.m. However, on August 8, 1981, while still on approved leave, Mr. Brakke was sent a Notice of Intent to Remove letter by Michael Ciancanelli, Chief at the Farmington Center, effectively terminating Mr. Brakke's employment. This was received by Mr. Brakke before his deadline shift. (App. E, p. 41) Mr. Ciancanelli testified that he overlooked the fact that Mr. Brakke was on annual leave when he sent the Notice of Intent to Remove letter. (App. E, p. 45) Further, once the letter was sent, all controllers who received them, including Mr. Brakke, were not allowed to report to work unless their discharge was overturned pursuant to administrative review procedures.

Mr. Sellner was subjected to similar treatment by Mr. Ciancanelli. Mr. Sellner also did not report to work during the presidential moratorium which included his shift on August

5, 1981, at 6:30 a.m. He was on leave of absence from August 6 through August 9, 1981. On August 7, 1981, Mr. Sellner received a similar Notice of Intent to Remove letter, effectively terminating his employment. (App. E, p. 43) As with Mr. Brakke, Mr. Sellner received his letter prior to his deadline shift which was on August 9, 1981. Mr. Ciancanelli again testified with regard to Mr. Sellner's termination that he overlooked his leave status when he sent that letter and that once that letter was sent, Mr. Sellner could not report for work and his only recourse was to pursue administrative review of his case. (App. E, p. 50)

What makes the cases of Mr. Brakke and Mr. Sellner remarkable and worthy of review by this Court, is that they are the *only* two air traffic controllers who were terminated for participating in the strike while they were on annual leave and who were not subsequently reinstated when the agency's error was discovered. In *every* other case we have been able to find involving an air traffic controller who was terminated for participating in the strike and subsequently found to have been on annual leave or regular day off when the Notice of Intent to Remove letter was sent, the controller has been reinstated. Under the standards established by the MSPB and the Federal Circuit Court of Appeals in those cases, there should be no doubt that Messrs. Brakke and Sellner are entitled to reinstatement. Inexplicably, they have been treated differently than every other similarly situated air traffic controller and have been denied reinstatement despite their clear entitlement to their jobs.

The burden on the agency in these cases to sustain the employment action taken against Brakke and Sellner was to show that both Brakke and Sellner "participate[d] in a strike . . .

against the government of the United States" 5 U.S.C. §7311 (3). Participation for purposes of the statute is shown when the employee withholds his or her services in concert with other employees. *Schapansky v. Department of Transportation, FAA*, 735 F.2d 477, 482 (Fed.Cir. 1984). The Federal Circuit Court of Appeals has held that it is not necessary to show a specific intent to strike, but that an unexplained and unauthorized absence during a widespread strike of general knowledge establishes a prima facie case of strike participation. *Schapansky*, 735 F.2d at 483. Once a prima facie case is established, the burden of going forward with evidence of nonparticipation shifts to the employee, requiring the employee to produce explanatory evidence to rebut the prima facie case. 735 F.2d 482. At all times however, the burden of proving the charge by a preponderance of the evidence rests with the agency.

Messrs. Brakke and Sellner each conceded at their respective hearings for their removal that they were aware of the strike action by PATCO and that they were in fact absent from work on certain days after the presidentially established moratorium. But both also unequivocally established that their absence, just prior to their termination, was not due to their participation in the strike, but rather as a result of their being on approved leaves of absence. The FAA conceded that both Brakke and Sellner were on approved leaves of absence at the time they were terminated and that those leaves were never cancelled. Moreover, the facility chief testified that subsequent to issuance of the Notice of Intent to Remove letter they would not have been allowed to report to work. The MSPB and the Federal Circuit chose to ignore this evidence however and determined, despite evidence to the contrary, that petitioners in fact participated in the strike and were subject to removal

from service with the agency. See, *Alan R. Brakke*, Initial Decision No. CH075281F1065 (December 22, 1982) (App. E, p. 33-36); *Mark J. Sellner*, Initial Decision No. CH075281F2915 (December 22, 1982) (App. E, p. 39-40).

This determination was clearly contrary to existing precedent and case law and disregarded the objective facts. Both the MSPB and the Federal Circuit have determined that an employee who can demonstrate that he or she was on an authorized leave of absence for the period of time he/she was alleged to have been striking, can show that they were not participating in allegedly unlawful strike activity. *Letenyei v. Department of Transportation, FAA*, 735 F.2d 528, 533 (Fed.Cir. 1984). See, also *Trick v. Federal Aviation Administration*, MSPB Docket No. DC0752811F1144 (December 17, 1981) cited in *Letenyei*. In *Letenyei*, the Federal Circuit noted that the agency's prima facie case could be rebutted either by showing that the employee was on an authorized leave or by showing that the employee had a good faith belief that his absence was authorized. The Court noted that strike participation basically requires a two-part showing: (1) that the employee withheld his services, i.e., that he was absent without excuse or authorization; and (2) that the employee acted in concert with others in withholding his services. 735 F.2d 532. The Court in *Letenyei* therefore established, as a threshold question, the burden on the agency to show that the employee in fact withheld his services, and could have, but voluntarily chose not to, report to work.

At this point it is necessary to note that there are three distinct periods of time when petitioners were absent from work that are relevant to their cases. The first period is the time involving President Reagan's moratorium period within which air traffic controllers were required to return to work. Air

traffic controllers who returned to work by the time of their first regularly scheduled shift after the expiration of the moratorium period were allowed to return to work and were not disciplined for their absences on August 3, 4 or 5, 1981. Any employee who was absent without excuse or authorization from his next scheduled shift commencing after 11:00 a.m. E.D.T., on August 5, 1981, was terminated for participating in the strike. Therefore, if Messrs. Brakke and Sellner were found only to be absent for periods of time during the Presidential moratorium period, they would not be subject to termination.

The second period that must be considered is the period after the moratorium period during which Brakke and Sellner were on approved leaves of absence up until the time they were terminated. The agency has conceded that Brakke and Sellner were on approved leaves of absence from August 5, 1981 until the date they received their Notice of Intent to Remove letters. (App. E, p. 33, 39) There is no question under *Letenyei* and *Schapansky* therefore, that subsequent to August 5, 1981 and until the time they were removed from service, Brakke and Sellner did not unlawfully withhold their services from the agency. Clearly, Brakke and Sellner could not be terminated for being absent and participating in the strike when their absences were authorized by the agency.

The third and final period that is relevant is the time subsequent to the expiration of their leaves of absence and during which their respective deadline shifts fell due. However, both Brakke and Sellner were issued letters of termination while they were on authorized leave, prior to their deadline shift, and prior to the time they had an opportunity to offer their services to the agency. The hearing officer determined, that despite being removed from service prior to their deadline

shift, Brakke and Sellner could have attempted to report on that date and failure to do so indicated their participation in the strike. (App. E, p. 35, 40) Each of these periods will be considered separately below.

The hearing officer clearly considered Brakke's and Sellner's absences prior to the expiration of the moratorium as grounds for their termination. While finding that Brakke's deadline date was August 10, 1981 and Sellner's deadline date was August 9, 1981, the hearing officer held that Brakke had "participated in the PATCO strike on August 3, 4 and 10, 1981," and that Sellner had "participated in the PATCO strike on August 3, 4, 5 and 9, 1981." (App. E, p. 36, 40) Termination of Brakke and Sellner for their actions prior to the expiration of the presidential moratorium period was only appropriate if the agency could show strike participation subsequent to the moratorium period. *Anderson v. Department of Transportation, FAA*, 735 F.2d 537 (Fed. Cir.) *cert. den.* 105 S.Ct. 432 (1984). The MSPB and the Court of Appeals have both recognized that actions during this grace period could not alone form the basis for removal. *Anderson*, 735 F.2d at 540; *Robert Bucholz*, Initial Decision No. SL0752181F0360 (January 25, 1983) (App. E, p. 57); *Ronald J. Peters*, Initial Decision No. BN075281F0241 (February 1, 1983) (App. E, p. 96). While unauthorized absences during the moratorium period may be relevant in considering other absences at a later date, an unauthorized absence during that period of time alone is not sufficient grounds for termination. Therefore if, as is shown infra, Messrs. Brakke and Sellner were not absent without authorization subsequent to the grace period, they could not properly be terminated from service with the agency.

The agency has conceded that Brakke and Sellner's absence during the time subsequent to the grace period through the time they received the Notice of Intent to Remove letters was authorized and the hearing officer did not in fact consider this period of time in making his determination. Under the standard established in *Letenyei*, an individual cannot be "participating" in the strike as long as that individual is on an authorized leave, since that absence does not constitute withholding of services. Brakke and Sellner therefore were not and could not have been disciplined for their absences prior to the date they received their termination notices.

Given the inability of the agency to establish participation in the strike on the part of Brakke and Sellner prior to their receiving the Notice of Intent to Remove letter, it is clear that their terminations were inappropriate and contrary to agency rules and decisions and to the objective, admitted facts. However, the hearing officer, disregarding the impact of the authorized leaves, and disregarding the fact that they were terminated before they had the opportunity to withhold any services, upheld their termination on the theory that since they did not report to work for their deadline shifts, after their leaves had expired and despite having already been informed by the agency that they were removed from service, Messrs. Brakke and Sellner were participating in the strike on that date and should be terminated. As shall be shown hereafter, this result is contrary to the holding of every other reported case uncovered in our research involving air traffic controllers terminated while on annual leave.

The essence of the hearing officer's decision is that despite the fact that Brakke and Sellner had been told that they were removed from service, and despite the agency's admission that their only alternative after receipt of the Notices was to pur-

sue administrative review, Messrs. Brakke and Sellner should nevertheless have attempted to report to work on their deadline shifts. As noted earlier, the Federal Circuit Court of Appeals has stated that the agency must prove two elements to support a charge of striking: (1) that the employee withheld his services, i.e., was absent without excuse or authorization; and (2) that he acted in concert with other employees. *Letenyei*, 735 F.2d at 532.

Given their removal from service, it is impossible for the agency to show that either Brakke or Sellner withheld their services when they failed to report to work after having already been informed they were fired. Inasmuch as Brakke and Sellner were removed from their positions *prior* to their deadline dates, as a matter of logic, they could not have withheld services which were not required, requested, nor permitted. It is logically inconsistent and unjust for the agency on the one hand to tell Brakke and Sellner that they were terminated and that their services were no longer required nor desired, and to then turn around and fire them for not reporting to work after having told them to stay away. The agency has admitted that even had they offered to return to work, Brakke and Sellner would not have been permitted to do so. It is impossible to withhold services which could not have been rendered, and the hearing officer's holding to the contrary is disingenuous and incompatible with fairness, logic and the objective facts. Withholding one's services implies a voluntary act incompatible with being locked out from one's job. The agency made the mistake of improperly issuing the Notice of Intent to Remove letter and it should be the agency, not Messrs. Brakke and Sellner who should be held accountable for that mistake.

The MSPB has recognized that the charge of withholding one's services requires proof by the agency that the decision was voluntary and that the individual could in fact have rendered services to the agency. In *Ketchem v. Department of Transportation, FAA*, MSP Doc. No. DA075281F0713 (Nov. 23, 1982) (Appendix E, p. 80), the MSPB addressed the issue of the burden facing the agency in showing strike participation. The MSPB noted:

> Nor does the official notice taken by the board in the Order of May 28, 1982 in any way relate to the agency's burden of proof of any individual Appellant's participation in the strike regardless of the date charged. Such burden includes proof of unauthorized absence which in turn requires specific proof that the agency would have allowed an individual Appellant to return to work in cases where that point is an issue.

Given Ciancanelli's undisputed testimony that Brakke and Sellner would *not* have been allowed to return to work under any circumstances until they were reinstated administratively, there is absolutely no way the agency could prove that it would have allowed Brakke and Sellner to offer their services subsequent to the Notice of Intent to Remove letter.

As noted earlier, in every other case of which petitioners are aware, when a controller was erroneously sent the Notice of Intent to Remove letter *prior* to their deadline shift and therefore prior to the time they were required to return to work, the controller was reinstated on the grounds that the employee was not afforded a full opportunity to meet the presidential deadline as implemented by the agency. See Excerpted Decisions of MSPB attached hereto as Appendix E: *George P. Moody*, Initial Decision No. BN075281F0588 (January 22,

1983); *Robert Bucholz*, Initial Decision No. SL0752181F0360 (January 25, 1983); *Dean Rickels*, Initial Decision No. CH07-5281F2732 (January 15, 1983); *Nancy B. Lamden*, Initial Decision No. CH075281F2159 (January 15, 1983); *Alan I. Lamden*, Initial Decision No. CH075281F2153 (January 15, 1983); *Jerome Schiltgen*, Initial Decision No. CH075281F2851 (October 15, 1983); *Ronald J. Peters*, Initial Decision No. BN075-281F0241 (February 1, 1983); *Harold G. Sherven*, Initial Decision No. CH075281F2929 (January 22, 1983); *Perry R. Brinkman*, Initial Decision No. CH075281F1084 (January 22, 1983); *Roger O. Moore*, Initial Decision No. AT075281F1693 (January 11, 1983); *Kenneth Bruck*, Initial Decision No. CH-075281F1113 (February 1, 1983); *Dwight King*, Initial Decision No. CH075281F2051 (February 1, 1983).

Two cases which are particularly analogous to Messrs. Brakke and Sellner involved George P. Moody and Robert Bucholz. These cases are illustrative of the principle established by the MSPB in cases similar to petitioners'; namely, that premature notice of removal rebuts a prima facie case of participation in the strike.

Mr. Moody at the hearing before the MSPB admitted that he was scheduled for work on August 3 and 4, 1981, and that he did not work and in fact was on strike on those days. Because of his scheduled days off and the presidential grace period, Mr. Moody believed that his deadline shift was August 7, 1981. Prior to his deadline shift he received his proposed removal letter. Mr. Moody testified that when he received the proposed removal letter on August 7 before 3:00 p.m., he concluded that in effect he was fired and would not be allowed to report for his 3:00 p.m. shift. Mr. Moody also testified that as of the morning of August 7, he had not yet made a final decision as to whether he was going back to work. He furthermore

admitted that he did not attempt to call or report to the facility on August 3 or anytime later. Mr. Moody was involved in a demonstration in front of the facility on August 5. He also admitted that he never raised, during his written response to the proposed removal letter, the fact that he received the letter prior to his deadline shift. Finally, Mr. Moody did not avail himself of the opportunity for an oral reply.

With these facts nearly identical to Mr. Brakke and Mr. Sellner's cases, the presiding official in Mr. Moody's case reinstated him. The presiding official stated:

> Therefore, I must conclude that on Friday noontime, August 7, 1981, appellant reasonably believed that he would not be permitted to return to work for his 3:00 p.m. shift, due at least in part, to the FAA's own actions. Accordingly, I must further conclude that the agency is estopped from removing appellant for his participation in a strike on August 3, 1981, because he was not afforded a fair chance to meet the president's deadline as implemented by the agency. Consequently I find no penalty should be imposed, consistent with those cases where controllers were permitted to return. (Opinion at p. 10, Appendix E, p. 66).

Like Mr. Moody, Mr. Bucholz did not appear at work on August 3, 4 and 5. His annual leave for these days was cancelled. He had uncancelled annual leave and regular days off from August 6 through at least August 15. His deadline shift, under the president's moratorium, was August 16 or after. Prior to his deadline shift however, he was issued a letter of proposed removal charging him with striking and being AWOL from 2:00 p.m. on August 3, through August 9. The facility chief admitted that he could not explain why the appellant was charged with striking before his deadline shift.

The facility chief testified that Bucholz was no longer able to work once the proposed removal letter was sent. This letter was identical to the letter sent by Michael Ciancanelli to Messrs. Brakke and Sellner. Mr. Bucholz did not testify at the MSPB hearing and the facility chief testified that Mr. Bucholz did not at any time offer any explanation for his absences. The presiding official in the Bucholz case reinstated him, stating:

> "Therefore, I find that Appellant Bucholz did not receive the full benefit of the grace period. His removal was proposed prior to his actual deadline date, and he also received the notice of proposed removal prior to that date." (Opinion at p. 10, Appendix E, p. 59).

Given the recognition by the MSPB in these cases and in the other cases cited, that a premature Notice of Intent to Remove letter effectively denied the controllers the rights established pursuant to the presidential grace period, it was clearly incorrect for Hearing Officer Russell to reach the decision that he did with regard to Mr. Brakke and Mr. Sellner. While every other air traffic controller similarly situated was deemed to establish by virtue of the premature notice that their absence was not the result of participation in the strike, Brakke and Sellner have been treated differently. Mr. Russell's conclusory dismissal of the relevance of that notice flies in the face of every other decision rendered under similar circumstances.

Messrs. Brakke and Sellner were not the only controllers at the Minneapolis Air Route Traffic Control Center adversely affected by the administrative error by Mr. Ciancanelli regarding the return to work date and uncancelled leave. The following controllers at Minneapolis ARTCC were improperly

issued Notice of Intent to Remove letters by Mr. Ciancanelli and reinstated at the administrative hearing stage:

Alan I. Lamden, supra
Nancy B. Lamden, supra
Dean H. Rickels, supra
Jerome Schiltgen, supra

Not only are all the above reinstated, but Mr. Russell was the presiding official in the case of Jerome Schiltgen. Mr. Russell determined that because Mr. Schiltgen was on annual leave from Minneapolis ARTCC when his Notice of Intent to Remove letter was issued, the agency had not established that he was on strike. That is identical to the situation of Messrs. Brakke and Sellner.

One final case that should be mentioned in this regard is that of Mr. James Machnik. See, Testimony of Michael Ciancanelli regarding Machnik termination, (App. E, p. 55); Letter from Ciancanelli to Machnik dated September 9, 1981, (Appendix E, p. 44). Mr. Machnik was the only individual at the Farmington facility who was reinstated after the oral reply level by Mr. Ciancanelli. Like Brakke and Sellner, Mr. Machnik was mistakenly removed from service while on annual leave by Mr. Ciancanelli, but unlike Brakke and Sellner he was reinstated apparently without regard to the "intent" behind his absences. What makes Machnik particularly noteworthy is the fact that he, Brakke and Sellner arranged to have simultaneous leaves in order to go on a fishing trip together. Inexplicably, only Machnik was reinstated after the procedural error was brought to the agency's attention.

The bitter irony and injustice of Mr. Machnik and Mr. Schiltgen being reinstated and the petitioners being discharged is heightened by reference to Mr. Russell's opinion reinstating Mr. Schiltgen wherein he states:

> ". . . Moreover, I find no material difference between appellant Schiltgen's case and the case of a Mr. Machnik who was returned to duty at the center after making an oral reply indicating he was on annual leave during the time he was charged with being on strike. Accordingly, I find that the agency has not shown by a preponderance of the evidence that appellant Schiltgen participated in a strike and that charge is not sustained." [See Appendix E, p. 78].

The fact of the matter is that there is "no material difference" between the cases of petitioners and Messrs. Machnik and Schiltgen.

The apparent justification for Mr. Russell's decision regarding Brakke and Sellner and the subsequent affirmations on appeal is the conclusion that the Notice of Intent to Remove letters were not the reason Mr. Brakke and Mr. Sellner did not report for work on their deadline shift. Mr. Russell's focus on the intent of Mr. Brakke and Mr. Sellner in determining why they did not report to work is based on the requirement that the agency show "concerted activity" as delineated by *Letenyei*. However, Mr. Russell, the MSPB and the Federal Circuit Court of Appeals should never even have considered this issue since the agency did not establish the first element of the *Letenyei* test, namely that Messrs. Brakke and Sellner withheld services. If the agency cannot show that they unlawfully withheld services, it cannot prove participation in the strike regardless of intent. The *objective and undisputed* facts establish the Notices of Intent to Remove were sent and received prior to the deadline shifts and that employees were not permitted to return to work under such circumstances. Thus, Messrs. Brakke and Sellner did not have

an opportunity to withhold services after the Presidential moratorium. Intent, therefore, never becomes an issue.

Russell, in effect, inappropriately placed the burden on Brakke and Sellner to show that they could not have rendered services to the agency, rather than requiring the agency to show that they would have allowed Brakke and Sellner to return to work. This decision conflicts with the burden on the agency established by the MSPB in *Ketchem* and is contrary to every other reported decision involving similar facts. The facility chief, Michael Ciancanelli, admitted that once the Notice of Intent to Remove letters were sent, the only recourse for Brakke and Sellner was to pursue their administrative remedies, and that in no event would they have been allowed to report to work for their deadline shift. Russell, however, ignored this undisputed evidence and instead focused on the alleged subjective "reasons" for Brakke and Sellner not reporting to work. While Messrs. Brakke and Sellner have disagreed with the conclusions as to their intent, that is not an issue. The error there was that subjective intent can never be an issue when the objective facts establish that the FAA removed Brakke and Sellner from service and left them only with the option of the administrative process before the intent (i.e. to return to work) could ever have been demonstrated.

Neither the MSPB nor the Federal Circuit Court of Appeals recognized this critical flaw in Russell's analysis of Brakke's and Sellner's cases. The MSPB in its summary affirmance of Mr. Russell's decision did not address the issue in any fashion. The Federal Circuit Court of Appeals however, grounded its decision principally on Russell's credibility resolution as to the reason, i.e., intent, behind Brakke and Sellner's decision not to report to work for their deadline shift. As to Brakke, the court noted:

> As to Brakke, the presiding official found that he "has provided insufficient evidence to support a finding that he had decided to return to work but was dissuaded therefrom by his receipt of the letter of proposed removal." This finding is supported by substantial evidence.

(Decision of the Court of Appeals for the Federal Circuit, p. 5, Appendix A, p. 5). Similarly as to Sellner, the Court noted:

> As to Sellner, the presiding official concluded that he could not "give credence to" Sellner's "argument that he did not report for work on August 9 because he believed his deadline to be August 5." This conclusion is supported by substantial evidence.

(Decision of the Federal Circuit Court of Appeals, p. 6, Appendix A, p. 5).

In each case the court affirmed Russell's conclusion as to Brakke's and Sellner's intent without ever addressing the threshold question of whether Brakke and Sellner withheld any services from the agency. Under the standard established by the Federal Circuit in *Letenyei* and by the MSPB in *Ketchem*, it was an absolute prerequisite that the agency first establish that Brakke and Sellner could have rendered services before the question of intent ever became relevant.

An indication of the Federal Circuit's misapprehension of the issue in this matter is its reference in its decision to *Adams v. Department of Transportation, FAA*, 735 F.2d 488 (Fed. Cir.) cert. denied 105 S. Ct. 432 (1984). In *Adams*, the controller sought to show that they did not form the requisite "intent" to strike because they mistakenly believed that they had been fired for not reporting to work during the moratorium period. In addressing the "reasons" for Brakke and

Sellner's absence, the Court quoting from *Adams* stated: " "The argument that confusion"—even if it is the result of an issuance of a premature letter of proposed removal—"prevented formation of an intent to strike is at best unpersuasive." (citation omitted)" (Decision of the Federal Circuit Court of Appeals, p. 6, Appendix A, p. 6). Unlike *Adams*, however, there was no confusion with regard to Brakke and Sellner; they *were* in fact removed from service, and therefore prevented from returning to work by the agency's own action. The Court's reference to this decision reinforces the conclusion that it simply failed to recognize the threshold issue in this matter, namely whether Brakke and Sellner were fired before being given the opportunity to decide whether or not to return to work.

The question therefore, that is ultimately presented to this court for review in this case is a narrow one. The question in simplest terms, is whether or not Brakke and Sellner can be found to have withheld their services after having been removed from service by the agency by issuance of its Notice of Intent to Remove letter. There are no facts in dispute as to this issue, Brakke and Sellner admit that they did not report to work, while the agency admits that the Notice of Intent to Remove letter was sent prior to their deadline shift and that subsequent to that letter being sent, Brakke and Sellner would not have been allowed to return to work absent reinstatement pursuant to the administrative process. There is also no need to indulge in an evaluation of the credibility of any witnesses. The "intent" of Brakke and Sellner is irrelevant absent a showing that they withheld their services. If this case turned on whether or not Mr. Brakke and Mr. Sellner intended to participate in the strike, the credibility resolutions of Mr. Russell would obviously have to be deferred to. Finally, there

is no need to weigh the evidence. Resolution of this issue requires only a determination that, as a *matter of law,* once a controller was issued the Notice, he either could or could not render services, and therefore could or could not withhold them. If this court determines that as a matter of law, neither Brakke nor Sellner could have withheld their services subsequent to receiving those letters, then the question as to their "intent" is irrelevant, and they must be reinstated to their positions.

It is perhaps appropriate at this point to again take note of the task facing Messrs. Brakke and Sellner in seeking this petition. They have pursued their cases to this Court as the court of last resort because they are firm in their belief that they have been wronged by the actions of the FAA, and that the MSPB and the Federal Circuit Court of Appeals has either misunderstood the nature of their claims or callously disregarded the true facts of their cases. Mindful of the significant burden required to pursuade this Court to issue the petition requested, Messrs. Brakke and Sellner urge this Court to review their case as one which cries out for correction of a fundamental error and gross unfairness. While a decision reversing the Federal Circuit would not create a significant legal precedent nor provide any noteworthy extension of existing law, it would serve the purpose of correcting an injustice, minor perhaps in the full fabric of American jurisprudence, but of large and vital significance to Mr. Brakke and Mr. Sellner. This Court should determine that as a matter of law the Federal Circuit Court of Appeals erred, and that Mr. Brakke and Mr. Sellner should be reinstated to their positions.

CONCLUSION

Alan R. Brakke and Mark J. Sellner respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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FENLON & VOGT, P.A.
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Attorneys for Petitioners

August, 1986

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

ALLAN R. BRAKKE and MARK J. SELLNER,
Petitioners

v.

DEPARTMENT OF TRANSPORTATION, AND
FEDERAL AVIATION ADMINISTRATION

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ROBERT L. BACH
ROBERT S. HALAGAN
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APPENDIX

APPENDIX A

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 85-1013
MSPB Docket No. CH075281F1065

ALAN R. BRAKKE,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,

Respondent.

Appeal No. 85-1013
MSPB Docket No. CH075281F2915

MARK J. SELLNER,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,

Respondent.

DECIDED: April 21, 1986

Before FRIEDMAN, *Circuit Judge*, BENNETT, *Senior Circuit Judge*, and BISSELL, *Circuit Judge*.

PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board (Board), affirming the Petitioners' removal by the Federal Aviation Administration, Department of Transportation (FAA), is *affirmed*.

OPINION

Notwithstanding the request of counsel for oral argument, we have determined on the basis of the request and the briefs that oral argument will not be necessary because the dispositive issue or set of issues has been authoritatively decided, the facts and legal argument are adequately presented in the briefs and record, and the decisional process would not be aided by oral argument. Fed. R. App. P. 34(a).

Petitioners seek review of a final order of the Board sustaining the decision of the FAA to remove them from their positions as air traffic controllers based upon their participation in an illegal strike against the United States and their absence from their positions without leave.

Petitioners were removed from employment as air traffic controllers at the Minneapolis Air Route Traffic Control Center located in Farmington, Minnesota. Upon the appeal of the FAA's decision to the Chicago Regional Office of the Board, the presiding official issued an initial decision affirming the FAA's actions. The initial decision became the Board's final decision after denial of petitions for review by the full Board.

In the initial decision the presiding official concluded that the strike began on August 3, 1981, and continued at the

Minneapolis Center through at least August 10, 1981. The agency presented documentary evidence to establish petitioners' absences, including time and attendance reports, position assignment work schedules, watch schedules and sign on/off logs. The evidence presented by the agency also established that each petitioner was a member of the Professional Air Traffic Controllers Organization (PATCO) and was absent without leave from scheduled duty on the date of his deadline shift. The petitioners themselves did not claim to be at work on the dates in question. In accordance with this evidence, the presiding official determined that the agency had established a *prima facie* case against each of the petitioners.

In an attempt to rebut the agency's *prima facie* showing, both petitioners alleged that they were coerced into participating in the strike against the government. Both petitioners claimed that their refusal to report for work prior to the commencement of their deadline shifts was caused by their fear that PATCO members would retaliate against them, their families and their property. These fears were allegedly founded upon threatening words and/or deeds which fall into three categories: alleged threats of a general nature uttered by union officials and/or union enforcers, alleged instances of retaliation against controllers who disagreed with certain union policies, and alleged on-the-job harassment of recalcitrant union members and non-union members. In a thorough and detailed examination of petitioners' allegations of coercion, which is supported by numerous citations to the record, the presiding official determined that petitioners' allegations were not sufficient to establish that their absences from work were the result of intimidation. The presiding official also concluded that petitioners' allegations failed to meet the objective test of coercion set forth by the Board in *Johnson v.*

Department of Transportation, FAA, No. DC075281F0998 (MSPB November 10, 1982), *aff'd*, 735 F.2d 510 (Fed. Cir. 1984).

In addition, petitioners alleged that the reason for their failure to meet their deadline shift was not strike participation, but was their belief that they had been fired while on annual leave.

On appeal to this court petitioners urge reversal of the Board's final decision on the grounds that (1) they were not strike participants under the standards of *Schapansky v. Department of Transportation*, FAA, 735 F.2d 477 (Fed. Cir.), *cert. denied*, 105 S.Ct. 432 (1984), because they were on annual leave until the end of the Presidential moratorium, (2) they were acting under duress when they failed to appear at work, and (3) they did not report for their scheduled shifts on August 9 and 10, 1981, respectively, because they were prematurely issued notices of proposed removal prior to the expiration of their annual leave.

I

We first address the nonparticipation in the strike and the annual leave/premature removal notice contentions of the petitioners.

Brakke admits that he did not report for his scheduled shifts on August 3 and 4, 1981. Sellner likewise admits that he did not report for his scheduled shifts on August 3, 4, and 5. Brakke was on scheduled annual leave from August 5 through August 9, 1981, while Sellner was granted uncancelled annual leave beginning at 11:00 p.m. on August 5, 1981, through August 8, 1981. Overlooking these facts, the FAA issued to Brakke his letter of proposed removal on August 8, 1981, and to Sellner his letter on August 7, 1981. Second letters of removal were issued cancelling the first removal letters and

charging petitioners, respectively, with striking on August 3, 4 and 10 and with strike participation up to August 13, 1981.

The presiding official found that (1) both petitioners engaged in picketing, (2) Brakke did not call the facility to confirm his belief that he had been fired nor did he address this annual leave issue in either his oral or written replies, and (3) Sellner did not call the facility to explain his absences nor to question his first letter of proposed removal.

Petitioners' contentions that they cannot be found to have participated in the strike during the moratorium period is without merit. In *Anderson v. Department of Transportation, FAA*, 735 F.2d 537 (Fed. Cir.), *cert. denied*, 105 S.Ct. 432 (1984), this court held:

> Contrary to petitioners' argument, the grace period granted by the President did not relieve controllers of all obligations to contact their employer during the grace period. Thus, petitioners' premise that the controllers were fired only for their failure to report for their deadline shift, and not for conduct prior thereto is false.

Id. at 540.

As to Brakke, the presiding official found that he "has provided insufficient evidence to support a finding that he had decided to return to work but was dissuaded therefrom by his receipt of the letter of proposed removal." This finding is supported by substantial evidence.

As to Sellner, the presiding official concluded that he could not "give credence to" Sellner's "argument that he did not report for work on August 9 because he believed his deadline to be August 5." This conclusion is supported by substantial evidence.

Although perhaps not couched in the terms of deadline confusion, petitioners' arguments sound hauntingly similar to

those of the petitioners in *Adams v. Department of Transportation*, FAA, 735 F.2d 488 (Fed. Cir.), *cert. denied*, 105 S.Ct. 432 (1984). In *Adams*, this court stated:

> The briefs say controllers thought they had been fired when they did not report to work before 11:00 a.m. on August 5, 1981, and thus "could not" take advantage of the permission to return at the time of their first regularly-scheduled shift following that ending of the President's grace period. The argument is disingenuous. First, the President's announcement terminated no one, least of all nonstrikers. Second, petitioners' briefs do not explain why they did not, as did 1200 other controllers, report *before* 11:00 a.m. on August 5, 1981, or why they did not notify the agency at any time before their next scheduled shifts that they were not on strike, or why they did not simply report and announce their readiness to work at the time of their scheduled shifts, *if* they had no intention of striking at any of those times.

Id. at 490-91.

"The argument that confusion"—even if it is the result of the issuance of a premature letter of proposed removal—"prevented formation of an intent to strike is at best unpersuasive." *Id.* at 491.

II

The main thrust of petitioners' argument concerning the duress issue is that the evidence in the presiding official's opinion and in the record, if tied together, establishes that petitioners had a reasonable fear of physical danger to themselves and their families which a person of ordinary firmness would not resist and which was the direct cause of their failure to report to work. This contention is based upon the outcome of *Hanson v. Department of Transportation*, 16 M.S.P.R. 210

(1983), wherein the Board reversed the presiding official relying in large part upon facts present in all the instant appeals. The petitioners allege that since there was involved the same facility, the same consolidated hearing, the same testimony, their conduct was no less reasonable than that of Mr. Hanson and the different results cannot be reconciled. Petitioners urge that if Mr. Hanson has met the tests set out in *Johnson v. Department of Transportation, FAA*, 735 F.2d 510 (Fed. Cir. 1984), for a defense of coercion and duress so then have they and such an inconsistent result must lead to a reversal of their removals and to their reinstatement.

We would have to agree with petitioners that at first blush they would appear to have a persuasive argument. However, after addressing the differences, as opposed to the similarities, between the facts contained in *Hanson* and those pertaining to each petitioner here, the outcomes are not inconsistent.

In *Hanson*, the Board found that in addition to the generalized and indirect threats which permeated the atmosphere at the Farmington facility during the strike period, Mr. Hanson "presented credible evidence of a direct threat of personal harm," he worked on August 3rd, "he left the state on his scheduled days off (August 3-5) to minimize or avoid harassment about the strike," he "attempted to report for work the following day, August 6, which was his first scheduled shift during the strike," and "he had disassociated himself from the union and its activities as early as mid-1980." *Id.* at 211-212. There existed no evidence of participation in the strike by way of picketing, strike vote or attendance at PATCO rallies. On the totality of this evidence, the Board found that Mr. Hanson had "satisfied" the *Johnson* standard for coercion, and successfully rebutted the agency's *prima facie* case of voluntary strike participation." *Id.* at 212.

In this appeal, the decision of the presiding official shows that neither of the petitioners ever attempted to contact the agency to explain his absence prior to his removal date as did Hanson; neither received direct threats of injury to person or property nor made an attempt to cross the picket line; and both were found to have picketed.

Based upon the foregoing and the limited scope of our review, we hold that the decision appealed from was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, was not obtained without procedures required by law, rule, or regulation having been followed, and was supported by substantial evidence. 5 U.S.C. § 7703(c) (1982); *see Hayes v. Department of the Navy*, 727 F.2d 1535, 1537 (Fed. Cir. 1984).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 85-1013

ALAN R. BRAKKE, MARK J. SELLNER,
Petitioners,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Respondent.

JUDGMENT

ON APPEAL from the Merit Systems Protection Board in case No(s). CH075281F1065, CH075281F2915. This cause having been heard and considered, it is ordered and adjudged:

AFFIRMED.

Dated April 21, 1986.

Entered by Order of the Court
FRANCIS X. GINDHART
Clerk

Issued as a mandate: June 4, 1986.

Costs: Against, Petitioners
Printing—$36.32
Total—$36.32

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 85-1013
MSPB Docket No. CH075281F1065

ALAN R. BRAKKE,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,

Respondent.

Appeal No. 85-1013
MSPB Docket No. CH075281F2915

MARK J. SELLNER,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,

Respondent.

Before FRIEDMAN, *Circuit Judge*, BENNETT, *Senior Circuit Judge*, and BISSELL, *Circuit Judge*.

ORDER

A petition for rehearing having been filed in this case, UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

For the Court
By: DIANE FRYE
Chief Deputy Clerk
FRANCIS X. GINDHART
Clerk

Dated: May 28, 1986.

cc: Mr. Robert L. Bach
Ms. Sandra P. Spooner, DOJ

APPENDIX D

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Docket Number CH075281F0854

GREGORY H. ALBJERG, *et al.*
v.
DEPARTMENT OF TRANSPORTATION

OPINION AND ORDER

The agency removed appellants from their positions as Air Traffic Control Specialists (ATCS) at its Minneapolis Air Route Traffic Control Center, Farmington, Minnesota, based upon charges of participating in a strike against the United States Government and unauthorized absence (AWOL).

On appeal to the Board's Chicago Regional Office, 31 cases were consolidated for hearing. In his December 22, 1982, initial decision the presiding official sustained the agency actions, finding that the agency had presented a *prima facie* case as to each appellant and that appellants had failed to rebut the *prima facie* case by demonstrating that their actions were based upon coercion, or that the agency had committed harmful procedural error or prohibited personnel practices. He concluded that the appellants' removal constituted an appropriate penalty which promotes the efficiency of the service as required by 5 U.S.C. § 7513(a).

In separate petitions[1] appellants seek review of the presiding official's initial decision. Appellants repeat the same

[1] Petitions for review were filed by 27 appellants. A list of appellants whose appeals are adjudicated in this Order is set forth in the Appendix to this Order.

arguments made to and rejected by the presiding official, albeit, some of the arguments have application to only some of the cases, while others are applicable to all 27 appellants. Upon consideration of the petitions, we find that the legal issues raised have been addressed and resolved by the Board in other related cases, that the presiding official's findings as to those legal issues are essentially consistent with ours, although some of the lead cases *infra* had not been decided at the time the initial decision was issued, and that any inconsistency in the presiding official's determinations on those issues would not affect the outcome of these appeals.[2]

---

[2] The Board has resolved the issues in the petitions for review by the appellants in the following cases:

Schapansky v. Department of Transportation, MSPB Docket No. DA075281F1130 at 6 n.2 and 10-11 (October 28, 1982) (*prima facie* case of strike participation and reasonableness of the removal penalty); *Johnson v. Department of Transportation*, MSPB Docket No. DC075281F0998 at 11-12 (November 10, 1982) (standard for establishing a defense of coercion or duress); *Anderson v. Department of Transportation*, MSPB Docket No. SL075281F0347 at 7-8 and 13 (April 25, 1983) (confusion over "deadline shift," invocation of 5 U.S.C. § 7513(b)(1) to shorten the notice period and "command influence"); *Baracco v. Department of Transportation*, MSPB Docket No. DC075281F0895 at 17 (April 25, 1983) (failure to afford an employee "not less than 7 days" to respond to proposed adverse action and denial of request for extension of time to respond to proposed adverse action); *Karapinka v. Department of Energy*, 6 MSPB 114, 115-16 (procedural error by presiding official); *McPartland v. Department of Transportation*, MSPB Docket No. DA075281F1018 at 4 (February 8, 1983) (cancellation of previously approved leave); *Campbell v. Department of Transportation*, MSPB Docket No. DE075281F0674 at 15-16 (notice of readiness and desire to return to work and necessity to seek clarification from agency with respect to "deadline shift"); *Desiderio v. Department of the Navy*, 4 MSPB 171 (1980) (AWOL alone may be sufficient cause for removal); *Weaver v. Department of the Navy*, 2 MSPB 297, 298-99 (1980) (disagreement with presiding official's findings, credibility determinations and conclusions); *Arnett v. Kennedy*,

Having fully considered the appellants' petitions for review of the initial decision issued on December 22, 1982, and finding that they do not meet the criteria for review set forth at 5 C.F.R. § 1201.115, the Board hereby DENIES the petitions.

This is the final order of the Merit Systems Protection Board in these appeals. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113 (b).

Each appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

/s/ for ROBERT E. TAYLOR
Secretary

Dated: August 25, 1983.
Washington, D.C.

---

416 U.S. 134 (1974) (no right to a pre-termination hearing); *Martel v. Department of Transportation,* MSPB Docket No. BN075281F0558 at 20-21 (April 25, 1983) (employee's right to examine the material relied on by an agency in support of an adverse action under 5 C.F.R. § 752.404(b)). In addition, the argument that the agency committed prohibited personnel practices under 5 U.S.C. § 2302(b)(4), (5), and (6) does not persuade us that the statutory elements of such practices existed in these appeals. *See Bodinus v. Department of the Treasury,* 7 MSPB 385, 387 (1981).

APPENDIX

Gregory H. Albjerg	CH075281F0854
Robert D. Anderson	CH075281F0881
Alan R. Brakke	CH075281F1065
Terrance M. Bushard	CH075281F1151
Richard C. Carland	CH075281F1171
Orlyn L. Ellingson	CH075281F1463
Thomas F. Guise, Jr.	CH075281F1722
Richard W. Hailey	CH075281F1733
Douglas J. Homola	CH075281F1874
Robert T. Kadow	CH075281F1993
Terry R. Knutson	CH075281F2085
Gary L. Leech	CH075281F2190
Michael D. Longen	CH075281F2237
Jeffrey D. Lukanen	CH075281F2256
Francis J. McDonald	CH075281F2339
Joseph R. Meyer	CH075281F2387
Cecilia A. Nackowski	CH075281F2474
Robert A. Perkins	CH075281F2613
Donald L. Pitzer	CH075281F2647
Patrick J. Ross	CH075281F2794
Mark J. Sellner	CH075281F2915
Ricki L. Schuster	CH075281F2893
Lawrence J. Tighe	CH075281F3122
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APPENDIX E

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

IN THE MATTER OF:

Gregory H. Albjerg	Decision Number: CH075281F0854
Robert D. Anderson	Decision Number: CH075281F0881
Alan R. Brakke	Decision Number: CH075281F1065
Terrance M. Bushard	Decision Number: CH075281F1151
Richard C. Carland	Decision Number: CH075281F1171
Lynn A. Carlson	Decision Number: CH075281F1176
Orlyn L. Ellingson	Decision Number: CH075281F1463
Steven A. Fettig	Decision Number: CH075281F1525
Thomas F. Guise, Jr.	Decision Number: CH075281F1722
Richard W. Hailey	Decision Number: CH075281F1733
Douglas J. Homola	Decision Number: CH075281F1874
Wayne C. Johnson	Decision Number: CH075281F1970
Robert T. Kadow	Decision Number: CH075281F1993
Jeffrey A. Klyzub	Decision Number: CH075281F2079
Terry R. Knutson	Decision Number: CH075281F2085
Gary L. Leech	Decision Number: CH075281F2190
Michael D. Longen	Decision Number: CH075281F2237
Jeffrey D. Lukanen	Decision Number: CH075281F2256
Francis J. McDonald	Decision Number: CH075281F2339
Patrick J. Marren	Decision Number: CH075281F2298
Joseph R. Meyer	Decision Number: CH075281F2387
Cecilia A. Nackowski	Decision Number: CH075281F2474
Robert A. Perkins	Decision Number: CH075281F2613
Donald L. Pitzer	Decision Number: CH075281F2647
Patrick J. Ross	Decision Number: CH075281F2794
Mark J. Sellner	Decision Number: CH075281F2915
Ricki L. Schuster	Decision Number: CH075281F2893
Lawrence J. Tighe	Decision Number: CH075281F3122

Ferris C. Von Eschen, Jr. Decision Number: CH075281F3193
Marc Vogel Decision Number: CH075281F3189
Gregory L. Wells Decision Number: CH075281F3251

v.

Department of Transportation,
Federal Aviation Administration
Date: December 22, 1982

INTRODUCTION

By petitions filed between September 9 and October 12, 1981, the 31 appellants consolidated into this group appealed actions whereby the Department of Transportation, Federal Aviation Administration, Minneapolis Air Route Traffic Control Center, Farmington, Minnesota, removed them from their positions as Air Traffic Control Specialists. The appellants' removals became effective in August and September of 1981. Each appellant seeks to have his removal action set aside.

JURISDICTION

The Civil Service Reform Act of 1978, as codified in title 5 of the United States Code, grants federal employees the right to appeal to the Merit Systems Protection Board from an action appealable under any law, rule, or regulation. 5 U.S.C. 7701(a).

The appellants, who were non-probationary employees in the competitive service, have both a statutory and a regulatory right of appeal to the Board from their removal actions. 5 U.S.C. 7511(a)(1)(A), 7512, 7513(d), and 5 C.F.R. 752.401(a) and (b)(1), 752.405(a).

ANALYSIS AND FINDINGS

An agency may take a removal action against an employee ". . . only for such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a). The Board reviews whether the agency's reasons for taking an action are supported by a pre-

ponderance of the evidence and are for the requisite cause 5 U.S.C. 7701(a)(1), 5 C.F.R. 1201.56(a). Additionally, the Board considers and decides affirmative defenses wherein appellants allege that an appealed action must be overturned because it was based on harmful procedural error, prohibited personnel practices, and/or violations of law. 5 U.S.C. 7701(c)(2), and 5 C.F.R. 1201.56(b).

AGENCY'S CHARGES

In the appeals at issue, the agency stated in its advance notices that the appellants' removals were being proposed because: (1) each appellant violated 5 U.S.C. 7311, which bars government employment for an individual who participates in a strike, and 18 U.S.C. 1918, which makes participation in a strike against the government a crime for which a sentence of imprisonment can be imposed; and (2) each appellant was absent without authorized leave on specified dates during the course of an illegal strike taking place in August of 1981. The agency's decision notices found that its charges warranted removing the appellants from their positions.

With respect to its first charge, the agency must prove by preponderant evidence that a strike called by the Professional Air Traffic Controllers Organization (PATCO) was in progress from August 3 through August 10, 1981, covering the dates these appellants were allegedly on strike. It must also prove that each of the appellants participated in the strike. By order dated June 10, 1982, I informed the parties to this action that I had taken official notice (subject to rebuttal evidence) that a strike called by PATCO occurred at the Minneapolis Air Route Traffic Control Center (ARTCC or Center) beginning August 3 and lasting through August 6, 1981.[1] The

[1] The Board's order in *Ketchem v. Department of Transportation, Federal Aviation Administration*, MSPB Order No. DA075281F0713 (May 28, 1982) provides the basis for my taking official notice of the strike.

agency argues that the PATCO-called strike lasted at least through August 10, 1981, covering the dates these appellants were allegedly on strike. The appellants counter by arguing that President Reagan summarily terminated the strike on August 5, 1981, and that the FAA had made public statements that the strike was over prior to August 6.

To support its position that the strike lasted at least through August 10, 1981, the agency presented the testimony of the Minneapolis ARTCC Chief. He testified that he was informed on July 31, 1981, that PATCO was planning on instituting a "job action" beginning August 3. On August 3, the Chief testified, substantial numbers of Air Traffic Control Specialists failed to report for assigned shifts at the Center. Additionally, he observed PATCO pickets at the front gate of the facility beginning on the morning of August 3, and noticed that some of the persons picketing carried signs stating "PATCO on strike." These conditions continued at least through August 10, 1981, according to the Chief. He further testified that he was not informed by any PATCO leader that the strike was over prior to August 10, 1981. (Tr. 342, 565 and 829-830).

I have reviewed the parties' contentions concerning the length of the strike in conjunction with the court's definition of "strike" and "striking" found in *United Federation of Postal Clerks v. Blount*, 325 F. Supp. 879 (D.D.C.), *aff'd* 404 U.S. 802 (1971). Therein the court held that a "strike" is a concerted stoppage of work by employees and "striking" is an actual refusal in concert with others to provide services to one's employer. In light of the court's definitions of "strike" and "striking," I find that the actions of the labor organization and the individuals who belong to the organization that called the strike determine whether a strike is in progress. I fail to discern any basis for finding government officials' pronouncements that a strike has ended to be controlling in

this regard. The evidence elicited from the Minneapolis ARTCC Chief clearly establishes that PATCO was engaging in strike activities at that center at least through August 10, 1981. No rebuttal to that testimony is found in the record. In my judgment, a government official's opinion has no bearing on when a strike ends until the agency has formally removed striking employees from employment or has accepted them back to work. I believe that a close reading of the opinions expressed by the court in *U.S. v. PATCO*, 525 F. Supp. 821 (E.D. Mich. 1981), and *U.S. v. PATCO*, 524 F. Supp. 164 (D.D.C. 1981) are consistent with this position. The record establishes that none of these appellants had been removed from employment prior to August 10, 1981. (*See* Agency's responses to appellants' petitions, letters of removal, Tab 3). Accordingly, I find that the agency has established by a preponderance of the evidence that PATCO was on strike at the Minneapolis ARTCC from August 3 through at least August 10, 1981.

With respect to the appellants' alleged participation in the strike, the agency must first establish a *prima facie* showing of participation. *See Jones v. Tennessee Valley Authority*, MSPB Order No. AT07528010300 (February 19, 1982); and *Duckett and Yardley v. Tennessee Valley Authority*, MSPB Order No. AT07528010325 (February 19, 1982). In a case, such as this one, in which the existence of a strike is a matter of general knowledge, the agency may establish a *prima facie* case of an employee's voluntary participation therein by presenting evidence of his unauthorized absence from duty during the strike. The appellant has the opportunity to rebut the agency's *prima facie* showing by presenting evidence to show that he had no knowledge of the existence of the strike or to demonstrate that his absence was due to some factor other than intentional participation in the strike. The agency, of

course, must ultimately establish appellant's participation by a preponderance of the evidence pursuant to 5 U.S.C. 7701(c)(1)(B). *See Schapansky v. Department of Transportation, Federal Aviation Administration,* MSPB Order No. DA075281F1130, n. 2, (October 28, 1982).

The record evidence shows that each of the appellants was a member of PATCO, the labor organization that called the strike. The evidence also shows that each of the appellants was absent from scheduled duty on his deadline date; that is, the date of each appellant's first regularly scheduled shift following President Reagan's 48-hour amnesty period for reporting back to work. (*See* Agency's responses to appellants' petitions, GENOT 1/127, Tab 5).[2] Moreover, none of the appellants claimed to be at work on the dates in question. Accordingly, I find that the agency has established a *prima facie* showing that the appellants were participating in the PATCO strike at the Minneapolis ARTCC.

All 31 appellants contend that their participation in the strike was the result of coercion. The Board has held that an employee may rebut a *prima facie* showing of participation in a strike by establishing that his absence from work was caused by duress. *See Johnson v. Department of Transportation, Federal Aviation Administration,* MSPB Order No. DC075281F0998 (November 10, 1982). Therein the Board found that the appropriate standard for establishing a defense of coercion or duress requires the employee to demonstrate that his failure to report for work was the result of a threat or other intimidating conduct, directed toward him, sufficient to instill in him a reasonable fear of physical danger to himself or others, which a person of ordinary firm-

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[2] GENOT 1/127 was a teletype message from FAA Headquarters to FAA Facility Managers explaining how President Reagan's 48-hour amnesty program was to be implemented at the facility level.

ness would not be expected to resist. The Board further found that allegations of menacing tones or language, fear of financial ruin or jeopardy to career advancement, exuberant moral suasion, or any vexation, annoyance or pressure resulting in a state of mental perturbation, reluctance to act or a choice of inherently unpleasant situations, may not suffice to render involuntary an employee's alleged participation in a strike. In *Johnson*, at 11, the Board found that facts indicating the appellant overheard PATCO supporters stating in June of 1981, that "scabs" would end up with bullet holes and that another controller approached him in a menacing manner after he stated he could not support a strike were insufficient grounds to meet the Board's test for duress.

All appellants claim that their refusal to report for work prior to their scheduled deadline was caused by their fear of retaliation by PATCO at a later date against themselves, their families and their property. This fear, the appellants argue, was based upon prior threats made by union officials and the general on-the-job harassment non-union supporters received from PATCO controllers.

Several threats were of common knowledge to all appellants since they were often uttered during the spring and summer of 1981 at many union meetings and repeated innumerable times thereafter. Initially stated by "union enforcers," these threats were of the following general nature: "The guy that doesn't go on strike with us isn't going to know who it is that is breaking his leg or burning his house down because the union will bring in outsiders to carry out these threats." (Tr. 2000, 1286 and 1568). "People who go in (to work) are committing suicide." (Tr. 1570). "When we (PATCO) get back, I'll have no apprehension about stepping on some people's feet, breaking their toes, seeing people fall down stairs." (Tr. 2587). "We (PATCO) are an army and anyone that

doesn't go out on strike is a deserter and you know what they do to deserters." (Tr. 2467, 1566, 1691, 1902 and 2681). "People who don't strike will be dealt with at a later date." (Tr. 2843). "The union is not advocating any type of violence or use of firearms; however, we cannot control all of our members." (Tr. 1167, 1382, and 2682). And, to a member who stood up at a meeting to protest union tactics, "Wouldn't it be too bad if a few guys accidentally fell on top of you and you woke up in a hospital or face-up in a casket." (Tr. 1285 and 1333). In addition, the potential use of baseball bats was also discussed at some union meetings. The evidence of record fails to demonstrate that any of the above threats were ever directed specifically against any of the appellants. In the Board's view, as expressed in *Johnson*, at 11, overheard statements, menacing tones and generalized threats, directed toward or related to all potential non-strikers and heard or observed by appellants, are not sufficient to rebut the agency's *prima facie* case of striking. While threats of the above-described nature are therefore found insufficient to establish a defense of coercion, additional threats addressed to individual appellants which they may have found intimidating will be considered below.

In addition to threats of physical harm, the appellants' primary claim of duress is further based upon the long history of "pressure" exerted by PATCO against recalcitrant members and non-members in the working environment. This on-the-job harassment consisted of giving non-supporters the "silent treatment," calling them "scabs" or more vulgar names, refusing to cooperate while controlling air traffic and attempting to "set up" controllers, thus making them look bad and possibly even endangering flying safety. An additional tactic employed by the union, variously referred to as the "gauntlet" or "line-up," involving PATCO members lining

the hallway outside the control room and heaping verbal abuse upon non-supporters as they finished their shifts. The appellants allege that they were intimidated by PATCO's threat to continue the use of such tactics when they returned to work after the strike. This threat was published in a letter titled "THREE DAYS LEFT," which was posted on the union bulletin board in the facility prior to the June 22 "head count." (*See* Joint Appellants' Hearing Exhibit No. 2). The letter read, in pertinent part: "If . . . you're not with us, you are a loser. You are in the company of losers and you will spend the rest of your career (if you can endure the rest of your career) as a loser. . . . We won't forget you." Appellants argue that the on-the-job harassment coupled with PATCO's threat to carry through with it after the strike caused them to believe that working in such an environment would be unbearable and that consequently they would either lose their jobs or be forced to quit. (Tr. 1537, 1570, 1691, 1917, 2054, 2260, 2702, 2796, 2943 and 2945).

While I find appellants' testimony in this regard credible based upon their strong, although speculative, expectation that the majority of PATCO members would be returning to work, I do not find persuasive appellants' argument that their participation in the strike can thus be characterized as involuntary. Their argument fails in two critical respects. First, the on-the-job harassment they describe is not on its face the type of conduct that could instill in one a reasonable fear of physical danger. Second, the essence of this argument is purely economic in nature, i.e., loss of job. The Board has specifically found that such economic considerations as fear of financial ruin and fear of jeopardy to career advancement do not suffice to render involuntary an employee's alleged participation in a strike. *See Johnson*, at 9.

Fifteen of the appellants were developmentals (i.e., controllers in training) and raise the argument that they were coerced into striking by PATCO's threat to prevent their certification to Full Performance Level Air Traffic Controllers (FPL). This threat to "wash out" developmentals was taken seriously by them because of the training procedure followed by the agency. In the later phases of training, the developmentals worked in the control room under the supervision of trainers who were FPL controllers, a majority of whom were PATCO members. In addition to conducting most or all of the training, these trainers were also responsible for submitting written reports concerning the developmentals' progress and recommending whether they should be certified. While the authority to certify was held by the developmental's supervisors (who were management employees and therefore non-union), it is not unreasonable to find that developmentals believed, despite the assurances of management, that PATCO members held effective control over the certification process and, thereby, their future with the agency. (Tr. 1618, 2054, 2702, 2811, 2925, and 2943). I therefore find that the developmental appellants honestly believed, and not unreasonably so, that their non-participation in strike activities advanced by PATCO could very well lead to work-related difficulties, non-certification and, ultimately, loss of their jobs. However, as discussed above, this consideration is purely of an economic nature and in no way can be found to create in the developmentals a reasonable fear of physical danger. Their argument, therefore, fails to rebut the agency's *prima facie* showing of participation in the strike.

Appellants further argue that they were intimidated by what they observed happening to other controllers who had made known their disagreement with union policies. The Board has held that a showing of actual retaliation against

or harm to others does constitute a strong indicium of the reasonability of an employee's fear. *See Johnson*, at 14. The evidence of record in the instant case reveals two such instances of alleged retaliation that were common knowledge to all appellants. Many appellants alleged fear based upon the incident in which a "bomb" exploded in the front yard of controller James Kendzior after he missed the June 22, 1981, head count. Kendzior testified that his wife told him that the "bomb" explosion rattled the rear windows of their house. However, an inspection of his property revealed no evidence of any physical damage. (Tr. 1305). I therefore find it difficult to give any credence to appellants' contention that they found the "bomb" incident to be intimidating.

The other incident of alleged PATCO retaliation concerned an assault on controller Preston Banning in the Farmington American Legion Hall the day after he missed the June 22 head count. A witness to that event, controller Randy Kath, testified that PATCO member John Olmstead started swearing at Banning, calling him a traitor to his brothers and sisters. Olmstead then jumped Banning and proceeded to "try and choke him out and punch him in the face." (Tr. 1982). Mr. Banning's version of the incident, a signed one page handwritten note dated June 23, 1981, was submitted into evidence by appellants as part of their Joint Exhibit Number One. In pertinent part it reads: "I ordered my drink at the bar and Mr. Olmstead tried to talk to me about the union and the 'head count'. I said I don't want to talk about it and tried to walk away. Mr. Olmstead grabbed my shirt and pulled me toward him. At this time he was held back by a number of gentlemen in the bar. I finished my drink and left." In the absence of any other evidence of violence, retaliation or physical interference with non-strike supporters, I do not find that this

single incident is of sufficient gravity to constitute a strong indicium of the reasonability of appellants' fears.

The other incidents to fellow controllers which the appellants allege to be of an intimidating nature did not involve any physical violence. Developmental Keith Thompson resigned from the agency in the face of PATCO harassment. (Tr. 1161). Developmental Randy Krug was told that he might wake up in a hospital or end up face up in a casket. (Tr. 1285). Developmental Randy Kath was threatened with having his legs broken and family harmed if he did not stop organizing other developmentals to defy the union. (Tr. 1980). At a meeting in the home of appellant Tom Guise where developmentals were organizing an attempt to return to work, two union activists appeared without invitation. (Tr. 2084 and 1987-1989). These incidents, however, do not constitute the showing of actual retaliation or harm to others that the Board found in *Johnson* to be a strong indicium of the reasonability of an employee's fears. Also, due to the fact that the incident in appellant Guise's home took place on August 16, I do not find it particularly relevant to determining whether or not the appellants were coerced into striking prior to that time.

With respect to the conditions present on the picket line during the period in question, the appellants presented the testimony of Chief Robert E. Metcalf and Sergeant Daniel L. Churchill of the Farmington Police Department as well as Elmer Vesledahl, Guard Supervisor at the Farmington facility. Their testimonies establish that during the first week of the strike there were generally thirty to forty people present on the picket line at the gate to the facility. When cars went through the gate, there would mostly be a lot of shouting and cursing. In addition some picketers would walk slowly in front of the stopped vehicles, delaying their passage through

the gate by 30 to 45 seconds. During this delay, other picketers sometimes hit the vehicles with their hands or feet, put their faces flat up to the windows and made faces and, on occasion, dangled a rubber chicken in front of the vehicles. (Tr. 1070-1071, 1215-1217, 1197-1199 and 1273). The only act of violence occurred on the picket line on August 12, 1981, when a facility employee had an American flag torn off his vehicle by a picketer who then threw it on the ground and stomped on it. (Tr. 1194 and 1271). Other than that, there was only one other incident of property damage to a vehicle, and Sgt. Churchill testified that it was rather minor since he could not find any significant damage. (Tr. 1206).

Neither the Farmington policemen nor the facility guard supervisor were aware of anyone who was prevented from crossing the picket line. (Tr. 1207, 1236 and 1271). Appellants presented no evidence that there was ever any attempt made to physically restrain employees from crossing the picket line. I therefore find that the situation existing on the picket line at the gate to the facility was not of sufficient violence to instill in an employee crossing it a fear of harm to himself that a person of reasonable firmness could not have been expected to resist.[3]

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[3] *See Duckett and Yardley v. Tennessee Valley Authority,* MSPB Docket No. AT07528010325 (February 19, 1982); and *Jones v. Tennessee Valley Authority,* MSPB Docket No. AT07528010300 (February 19, 1982), in which the Board found that workers had successfully rebutted the agency's *prima facie* showing by establishing that they reasonably feared injury in crossing the picket line. The Board noted that there was evidence of "mob action and violence which occurred on the access road to the project, which included damaging vehicles by throwing rocks and other items, kicking and hitting with various objects, spitting on employees and inflicting bodily injury, harassing and intimidating employees to prevent their reporting for work, and creating an atmosphere of fear on the project." *Jones,* at 4.

In addition to the common arguments addressed above, each appellant offered rebuttal evidence to the agency's charges that they participated in the PATCO strike and were absent without authorized leave. I will now discuss the additional material evidence presented by the individual appellants and, in reaching a determination of their cases, consider such evidence in light of the preceding discussion.

INDIVIDUAL CASE ANALYSIS OF THE STRIKING CHARGE

Gregory H. Albjerg (Developmental)

Appellant Albjerg stipulated that he did not report for duty on August 4 and 5, 1981, and that he was scheduled for the 1:30 p.m. shift on August 5. (Tr. 665). Appellant failed to contact any agency officials about his absences prior to August 15, 1981, because of his fear that the union would find out. (Tr. 2479 and 2486). Albjerg participated in "informational" picketing at the airport on two occasions and participated in the PATCO organized rally at the facility at 10:00 a.m. on August 5, 1981. (Tr. 2455, 2482 and 2493).

In addition to the generally tense atmosphere discussed above, Albjerg testified to other personal threats to substantiate his argument that he was coerced into participating in the PATCO strike. In the spring of 1979, appellant and other developmentals were approached in the cafeteria by a union representative who said they would be putting their families in real danger if they did not participate in the upcoming strike, and further that there were a lot of radical people around that were not opposed to physical violence. (Tr. 2459 and 2460). Later at the August 5, 1981, PATCO rally, a union member told appellant that if he went back to work before the others, he would be committing suicide and could kiss his job good-bye. (Tr. 2482). With regard to the situation on the picket line, appellant testified that he drove past the facility

prior to the August 5 PATCO rally and noticed that a car, stopped at the gate waiting to get in, was surrounded by people who were shouting, screaming and yelling at the car. (Tr. 2481). Appellant then participated in the 10:00 a.m. rally. He did not testify to making any attempt to enter the facility at his deadline of 1:30 p.m. on August 5.

I do not find persuasive appellant's claim that he was coerced into participating in the strike. The additional threats addressed to Albjerg were either too remote in time or too general in nature to create in him a reasonable fear of physical harm or violence. The same can be said for the conditions he describes on the picket line on August 5. They fall far short of the violent acts which occurred on the picket line in *Jones* and *Duckett and Yardley*. With regard to appellant's alleged attempt to report for work on his deadline, the evidence shows that he arrived at the facility several hours before his regularly scheduled shift was to begin at 1:30 p.m.; that he arrived in time to participate in the 10:00 a.m. PATCO rally and that he did not attempt to either observe or cross the picket line at 1:30 p.m. on August 5. Accordingly, I find that appellant Albjerg failed to rebut the agency's *prima facie* showing that he participated in the PATCO strike on August 4 and 5, 1981. Therefore, I find that the agency supported its charges that appellant Albjerg so participated by a preponderance of the evidence, and the charge is sustained.

Robert D. Anderson (FPL)

Appellant Anderson did not report for duty on August 3, 4 and 5, 1981, and was scheduled for the 11:00 p.m. shift on August 5, 1981. (Tr. 315). Appellant did not call the facility about his absences prior to his deadline on August 5, 1981 (Tr. 1735). Anderson picketed at the facility on August 3 and 4, 1981, and participated in the PATCO rally on August 5 (Tr. 1745).

In addition to the commonly known threats, appellant Anderson was told that if he were a scab, his van would be ruined. (Tr. 1723). He also overheard two union people say during a midnight shift that: "In strikes, scabs get arms and legs broken. They get their faces bashed in. Their cars get damaged. In some cases, houses are burned." (Tr. 1726). During the first week of July, 1981, he was in the PATCO office when he heard that there would not be any scabs crossing the picket line if they had a .44 magnum pointed at them. (Tr. 1727). Appellant asserts that he wanted to return to work but was afraid of PATCO. (Tr. 1737).

I do not find persuasive appellant Anderson's claim that he was coerced into participating in the strike. The appellant introduced no evidence that any threats of physical violence (as opposed to property damage) were ever directed specifically at him. Hence, I find that, while the appellant may have been disturbed and upset by these statements, they represent nothing more serious than the generalized threats and overheard statements previously found insufficient to establish that one's participation in the strike was coerced. Accordingly, I find that appellant Anderson failed to rebut the agency's *prima facie* showing that he participated in the PATCO strike on August 4 and 5, 1981. Therefore, I find that the agency supported its charge that appellant Anderson so participated by a preponderance of the evidence, and the charge is sustained.

Alan R. Brakke, (FPL)

Appellant Brakke did not report for duty on his scheduled shifts on August 3, 4 and 10, 1981. (Tr. 338). The appellant was on approved annual leave from August 5 through August 9, 1981. When Facility Chief Michael Ciancanelli issued the appellant's letter of proposed removal on August 8, the Chief

overlooked the fact that the appellant's leave for that date had never been cancelled. (Tr. 339). A second letter of proposed removal was issued on August 14, 1981, cancelling the first letter of proposed removal and charging the appellant with participation in the strike up to August 14.[4] (*See* Agency's response to appellant's petition, Tab 1.) The appellant received the first letter on August 9 at approximately 12:30 p.m. (Tr. 1499). Brakke testified that when he received the August 8 letter he felt that his annual leave was no longer a consideration, that he therefore should have been back to work on August 8 and that consequently he was fired. (Tr. 1499 and 1528). He did not call the facility to confirm his belief nor did he address the annual leave issue in either his oral or written replies. (Tr. 1529-1533 and 1538). The appellant admitted that prior to receiving his letter of proposed removal he had received a telegram ordering him to report to his next scheduled shift and that he knew his deadline date was August 10 at 1:30 p.m. (Tr. 1527). The appellant picketed at the St. Paul airport on August 4 and on several other occasions during the second week of the strike and later. (Tr. 1524-1536).

Appellant's contention that he was coerced into participating in the strike was supported by his wife's testimony that he feared for the safety of his children because on August 6 he had visited the home of a working controller and discovered that he kept a rifle by the front door. (Tr. 1496-1498). In his own behalf, appellant asserted that there were a few union members whom he did not trust and could see doing almost anything. (Tr. 1522). He further asserted that his failure to

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[4] The first letter of proposed removal issued to each appellant incorrectly charged them with violation of 5 U.S.C. 7211. To correct this, the agency later issued each appellant an identical proposed removal letter, citing 5 C.F.R. 7311 and cancelling the first letter of proposed removal.

report for work on August 3 and 4 was due to his belief that when the union came back it would be the end of his career. (Tr. 1522).

I do not find from the evidence that appellant was coerced into participating in the strike. Appellant has not demonstrated that he was in any way personally threatened with physical retaliation. The fact that he allegedly did not trust certain unnamed union members is vague and general and consequently too slender a thread upon which to base a finding that he reasonably feared retaliation by strikers. *See Johnson*, n. 26. The fact that another working controller kept a rifle by his front door, allegedly out of fear of retaliation from the union, bears little direct relevance to whether this particular appellant's fears of retaliation were reasonable. The reasonableness of appellant's reliance upon this factor is further weakened by the fact that during his visit to that working controller's house, appellant was told by the working controller that the strike was over and maybe he also should return to work. (Tr. 1506). Further, the record is utterly devoid of any evidence of physical retaliation upon non-strikers. I therefore find that appellant Brakke has failed to establish that he was the object of such personal threats or other intimidating actions sufficient to instill in him a fear of harm to himself or others which a person of ordinary firmness could not have been expected to resist.

The appellant further contends that he did not report for work on August 10 because he believed he was fired. I do not find this argument persuasive. First of all, if I accept appellant's assertion that he did not appear for work on August 3 and 4 because of fear, he has produced no evidence suggesting that something occurred between August 4 and August 10 that would reasonably diminish his fears of physical harm that

allegedly kept him from reporting to work some six days earlier. Secondly, appellant neither called the facility upon his receipt of the letter of proposed removal to attempt to explain that he was on annual leave nor did he raise the issue in his oral or written reply. It is clear from appellant's testimony that he understood exactly when his deadline was because he used the telegram to explain the deadline to his brother who had come up from Iowa in an attempt to convince the appellant to return to work on August 8. (Tr. 1527). Finally, other than appellant's bare assertion, there is no evidence of record to corroborate his intent to return to work on August 10. In this vein, I note that instead of using his annual leave to go on a fishing trip as he originally had intended (Tr. 1523), he remained at home and engaged in picketing activities. Further, he and his wife admitted that at the time he received the letter of proposed removal (one hour prior to his 1:30 p.m. deadline), they had just returned from a union meeting. Therefore, I find that appellant Brakke has provided insufficient evidence to support a finding that he had decided to return to work but was dissuaded therefrom by his receipt of the letter of proposed removal.

Accordingly, I find that appellant Brakke failed to rebut the agency's *prima facie* showing that he participated in the PATCO strike on August 3, 4, and 10, 1981. Therefore, I find that the agency supported its charge that appellant Brakke so participated by a preponderence of the evidence, and the charge is sustained.

Terrence M. Bushard (Developmental)

Appellant Bushard stipulated that he did not report for duty on August 3, 4, and 7, 1981, and that he was scheduled for the 3:30 p.m. shift on August 7. (Tr. 687-688). Bushard did not contact the facility prior to his removal and failed to give a

reason for his absences. (Tr. 690). Appellant was present at the August 5 PATCO rally and was also present on the picket line August 7, but did not carry a picket sign. (Tr. 2528). Bushard also asserts that he witnessed shotgun shells being loaded in the union office some time between the June 22, 1981, head count and August 3. (Tr. 2515).

I do not find the fact that appellant saw shotgun shells being loaded in the union office to be intimidating conduct sufficient to instill in him a reasonable fear of physical harm to himself since that act at its worst represents nothing more than a kind of generalized threat directed at all non-strikers. *See Johnson,* at 11. I also do not find persuasive appellant's contention that he did not carry a picket sign while in the presence of the picketers on August 7. It is the employee's voluntary withholding of services in concert with others, and not his physical presence on a picket line, which constitutes the gravamen of a charge of participation in a strike. *See Schapansky* at 6. Appellant Bushard offered no other reason for his failure to report for duty on August 7. Accordingly, I find that appellant Bushard failed to rebut the agency's *prima facie* showing that he participated in the PATCO strike on August 3, 4, and 7, 1981. Therefore, I find that the agency supported its charge that appellant Bushard so participated by a preponderance of the evidence, and the charge is sustained.

Richard C. Carland (FPL)

The ARTCC Chief testified that appellant Carland did not report for his regularly scheduled shifts on August 3, 4, 5 and 6, 1981. (Tr. 352). Appellant claims that he was scheduled for annual leave from August 3 through August 8. (Tr. 1581). While working in his sector at the facility prior to the strike, Carland testified that his supervisor, Timothy Deer, asked

him "Do you want to cancel some of that leave?" Carland replied, "Yeah, cancel some of it." (Tr. 1580). Deer . . .

Although appellant Schuster raises coercion as a defense, claiming that the union called him every four hours during the first week of the strike and exhorted him to remain strong, it is quite apparent that his overriding consideration was career advancement and on-the-job harassment. All witnesses who testified on his behalf echoed this sentiment. Kelly Schuster, appellant's wife, testified that he wanted to go to work but could not because he "had to work with those guys later." (Tr. 2943). Fellow controller Norman Monroe said that appellant's major concern was whether he could put up with union harassment once PATCO returned. (Tr. 2945). Controller Robert Nicol testified that Schuster was not pro-union but rather went with the flow because he was worried about checking out. (Tr. 2952-2953). In his own testimony, appellant stated that the reason he did not go to work was because people he knew were going to be on the picket line and because to oppose the union would damage his career. (Tr. 2925).

The evidence adduced on behalf of the appellant consists of the types of considerations, on-the-job harassment and fear of jeopardy to career advancement, that were rejected by the Board in *Johnson* as insufficient to render involuntary appellant's participation in the strike. Accordingly, I find that appellant Schuster failed to rebut the agency's *prima facie* showing that he participated in the PATCO strike on August 3, 4, and 7, 1981. Therefore, I find that the agency supported its charge that appellant Schuster so participated by a preponderance of the evidence, and the charge is sustained.

Mark J. Sellner (Developmental)

Appellant Sellner did not appear for duty on his scheduled shifts on August 3, 4, 5 and 9, 1981, and did not call anyone at the facility to explain his absences. (Tr. 524 and 1357). He also picketed at the airport and was present on the picket line at the Center. (*See* Agency's response to appellant's petition, Oral reply summary, Tab 1).

The appellant had originally been scheduled for two shifts beginning on August 5. However, he had been granted approved annual leave for his midnight shift which was scheduled to begin at 11:00 p.m. This leave was never cancelled. (Tr. 1347). Considering the fact that his other shift on August 5 was scheduled to begin at 6:30 a.m., the appellant's deadline for reporting to work was August 9. Overlooking this fact, the agency issued his letter of proposed removal on August 7 and appellant received it on August 8. (Tr. 530 and 1346). A second letter of proposed removal was issued on August 13, 1981, cancelling the first letter of proposed removal and charging the appellant with participation in the strike up to August 13. (*See* Agency's response to appellant's petition, Tab 1). The appellant did not call the facility subsequent to receiving his first letter of proposed removal. (Tr. 1362).

The appellant claims that he understood his deadline to have been August 5. (Tr. 1346). In support of this contention, controller Eldon Miller testified that when he spoke with Sellner on August 6, appellant told him it was past his deadline. (Tr. 1326). I do not find persuasive appellant's contention that he did not return to work on August 9 because he believed his deadline to have been August 5. Appellant received the first letter of proposed removal around noon on August 8. (Tr. 1360). Later that day, appellant went to controller Miller's home just before Miller left for work. (Tr.

1356 and 1360). Miller was scheduled for the 4:00 p.m. shift on August 8. (*See* Agency's response to appellant Brakke's petition, Tab 5). Sellner's stated purpose for this visit was to see if there was any chance yet that he could return to work. (Tr. 1346). Miller offered appellant a ride to work, but appellant refused. Instead he asked Miller to speak with appellant's supervisor to verify his deadline. (Tr. 1357). The appellant did not call the facility himself or his supervisor to confirm this.

It is clear from the above testimony that appellant had already received his first letter of proposed removal when he spoke with Miller on August 8. It is further clear that he was unsure at the time of whether he could return to work. Therefore, I find it inconsistent for appellant to now claim that on August 9 he believed his deadline date to have been August 5. Consequently, I cannot give credence to his argument that he did not report for work on August 9 because he believed his deadline to be August 5.

Finally, appellant raises no additional evidence of intimidation that was not of common knowledge to all appellants. Accordingly, I find that appellant Sellner failed to rebut the agency's *prima facie* showing that he participated in the PATCO strike on August 3, 4, 5, and 9, 1981. Therefore, I find that the agency supported its charge that appellant Sellner so participated by a preponderance of the evidence, and the charge is sustained.

Lawrence J. Tigre (FPL)

Appellant Tigre stipulated that he did not report for duty on his scheduled shifts on August 3, 4, 5 and 8, 1981. (Tr. 534). Tigre did not call the facility to explain his absences. (Tr. 1909). He picketed approximately two times at the Minneapolis airport. (Tr. 1909 and 1914).

While appellant Tigre claims that he was intimidated into participating in the strike, he testified to receiving only one personal threat. Prior to the June 22 head count he was told: "You don't want to be a scab. If you are a scab, your career is over." (Tr. 1917). In light of the previous discussion relating to the requisites necessary to establish coercion, I find that appellant's concern for career advancement are insufficient to establish that his participation in the strike was justifiable. Tigre offered no other reason for his failure to report for duty on August 3, 4, 5, or 8. Accordingly, I find that . . .

AIR ROUTE TRAFFIC CONTROL CENTER
512 Division Street
Farmington, Minnesota 55024

August 8, 1981
Mr. Alan R. Brakke
R.R. No. 5
Northfield, MN 55057
Dear Mr. Brakke:

This is notice that I intend to remove you from your position of Air Traffic Control Specialist (C), GS-2152-14, $39,133, at the Minneapolis Air Route Traffic Control Center, 512 Division Street, Farmington, Minnesota. The reasons for the proposed action are:

Reason 1: Violation of 5 U.S.C. 7211 which states in pertinent part, an individual may not accept or hold a position in the government of the United States . . . if he . . . participates in a strike against the government of the United States . . . and 18 U.S.C. 1918 which makes participation in a strike against the government of the United States a crime for which a sentence of imprisonment can be imposed.

Specification: Beginning at approximately 7:00 a.m. EDT on August 3, 1981, a nationwide strike by air traffic controllers occurred. Beginning at 8:00 a.m. CDT on August 3, 1981, when you failed to report for duty, until the present, you participated in a strike against the United States government.

Reason 2: Unauthorized absence.

Specification: Beginning first with the 8:00 a.m. CDT shift on August 3, 1981, you failed to report for your scheduled tour of duty. On or after August 3, 1981, you were sent a telegram/mailgram that an illegal strike was in progress and that you must return to duty for your regularly scheduled shift. You failed to return to duty, and instead remained absent without authorization.

The material relied upon to support this proposed action is available for review at the Minneapolis Air Route Traffic Control Center, 512 Division Street, Farmington, Minnesota 55024. If you wish to review this material, please contact me.

The foregoing action constitutes a strike against the government, prohibited by 18 U.S.C. 1918 and 5 U.S.C. 7311. This gives me reasonable cause to believe you have committed a crime for which a sentence of imprisonment can be imposed. Therefore, you may reply to this notice personally, in writing, or both, and furnish affidavits and other documentary evidence in support of your answer to me, within 7 calendar days after you receive this letter. In making a reply, you have the right to be represented by an attorney or other representative. As soon as possible after your reply is received, or after the expiration of the 7-day limit, if you do not reply, I will issue a written decision on the proposed removal.

MICHAEL S. CIANCANELLI
Chief, Minneapolis ARTC Center

AIR ROUTE TRAFFIC CONTROL CENTER
512 Division Street
Farmington, Minnesota 55024

August 7, 1981
Mr. Mark J. Sellner
3725 148th St. W.
Rosemount, MN 55068
Dear Mr. Sellner:

This is notice that I intend to remove you from your position of Air Traffic Control Specialist (C), GS-2152-9, $18,585 at the Minneapolis Air Route Traffic Control Center, 512 Division Street, Farmington, Minnesota. The reasons for the proposed action are:

Reason 1. Violation of 5 U.S.C. 7211 which states in pertinent part, an individual may not accept or hold a position in the government of the United States . . . if he . . . participates in a strike against the government of the United States . . . and 18 U.S.C. 1918 which makes participation in a strike against the government of the United States a crime for which a sentence of imprisonment can be imposed.

Specification: Beginning at approximately 7:00 a.m. EDT on August 3, 1981, a nationwide strike by air traffic controllers occurred. Beginning at 1:00 p.m. CDT on August 3, 1981, when you failed to report for duty, until the present, you participated in a strike against the United States government.

Reason 2: Unauthorized absence.

Specification: Beginning first with the 1:00 p.m. CDT shift on August 3, 1981, you failed to report for your scheduled tour of duty. On or after August 3, 1981, you were sent a telegram/mailgram that an illegal strike was in progress and that you must return to duty for your regularly scheduled shift. You failed to return to duty, and instead remained absent without authorization.

The material relied upon to support this proposed action is available for review at the Minneapolis Air Route Traffic Control Center, 512 Division Street, Farmington, Minnesota 55024. If you wish to review this material, please contact me.

The foregoing action constitutes a strike against the government, prohibited by 18 U.S.C. 1918 and 5 U.S.C. 7311. This gives me reasonable cause to believe you have committed a crime for which a sentence of imprisonment can be imposed. Therefore, you may reply to this notice personally, in writing, or both, and furnish affidavits and other documentary evidence in support of your answer to me, within 7 calendar days after you receive this letter. In making a reply, you have the right to be represented by an attorney or other representative. As soon as possible after your reply is received, or after the expiration of the 7-day limit, if you do not reply, I will issue a written decision on the proposed removal.

Original signed by
MICHAEL S. CIANCANELLI
Chief, Minneapolis ARTC Center

MINNEAPOLIS AIR ROUTE TRAFFIC CONTROL CENTER
512 Division Street
Farmington, Minnesota 55024

September 9, 1981
Mr. James A. Machnik
R.R. 1
Red Wing, MN 55066
Dear Mr. Machnik:

My letter of August 14, 1981, informed you of a proposal to remove you from your position of Air Traffic Control Specialist (C), GS-2152-14, $40,395, at the Minneapolis Air Route Traffic Control Center, 512 Division Street, Farmington, Min-

nesota. I have fully reviewed and given consideration to your oral reply and written submission of August 26, 1981. An error was made in that your annual leave was not canceled and you should have been allowed to return to work on August 21, 1981, at 3:30 p.m. It is my decision, therefore, that you not be removed.

You are to report for duty on Monday, September 14, 1981, at 7:30 a.m. Your time and attendance report will be amended to show annual leave through August 20, 1981, and pay status through Sunday, September 13, 1981.

At a later date, disciplinary action may be taken against you for the two days you were AWOL, August 3 and August 4, 1981.

Sincerely,
MICHAEL S. CIANCANELLI
Chief, Minneapolis ARTC Center

EXAMINATION

BY MR. BACH:

Q. Mr. Ciancanelli, then you do not dispute that your records show that Mr. Brakke had annual leave on the 5th, regular days off on the 6th and 7th and annual leave on the 8th and 9th, is that correct?

A. That is correct.

Q. And your records reflect that those were not cancelled?

A. That is correct.

Q. Nevertheless you issued a letter to him on August 8 which indicated that you intended to remove him, is that correct?

A. That is correct.

Q. Even though he was on annual leave at that point?

A. That is correct.

Q. You sent out two letters, did you not, on August 8, a certified letter and a letter by regular mail?

A. That is correct.

Q. And you do that regularly for everybody else?

A. That is right.

Q. Now, you have stated that you understand then that Mr. Brakke's first shift on which he was to report back to work under the Presidential amnesty, and you interpret it was not until Monday, August 10, is that correct?

A. Based on the status of Mr. Brakke with annual leave, that would have been his shift, yes.

Q. Why did you send a letter out to him before that notifying him that you intended to relieve him from the service?

A. Any action that was taken at that time, it was not really observed that his leave was cancelled. It was not cancelled.

Q. So, you were not aware of his leave status at that point, is that correct?

A. No.

Q. Let's take a look at—

MR. RUSSELL: Wait a minute. The response is no, that is not correct or yes? I am not sure of the responses.

BY MR. BACH:

Q. The question is were you aware of his leave status when you issued the letter on August 8?

A. No.

Q. Now, directing your attention to the PAF schedules for August 10, upon what do you base your decision that he was to report to work at 8 o'clock that day?

A. The schedule shows Mr. Brakke was scheduled for a 0800 shift.

Q. What is the terminology? What shift is that?

A. It is E Shift.

Q. It is in fact his name crossed off here?

A. Yes.

Q. Would you turn to the next page? Wasn't he in fact scheduled to commence work at 1:30 in the afternoon on August 10, based upon that? There was a shift schedule?

A. Are you reading Mr. Brakke to be under O'Hara, is that correct?

Q. Yes.

A. Yes, that would be true. Yes.

Q. So, his first regularly scheduled shift after the Presidential amnesty was 1:30 p.m. in the afternoon on August 10, isn't that correct?

A. If that is Xed through his name it would be a 1:30 p.m., yes.

Q. So, it would have been the afternoon of the 10th?

A. Yes.

Q. When you made your determination to discharge him, did you have these documents before you?

A. Yes.

Q. Did you at all take into consideration the fact that he was on annual leave?

A. The further review up to and including my decision was not observed. It was not noted that he was on leave.

Q. You did not talk to the hearing officer or hearing reply official?

A. No.

Q. About this?

A. No.

Q. So, you just assumed that he was on strike and had no legitimate defense?

A. That is correct.

Q. Other than his failure to appear at work, you did not have any facts to conclude that he was participating in a strike?

A. No, I did not.

Q. Now, have you talked to Mr. Dennis Randolph about Mr. Brakke?

A. I do not recall discussing Mr. Brakke—correction. During this period, sir?

Q. No, at any point in time?

A. Oh, after I did talk to Mr. Randolph, yes.

Q. And for what purpose did you talk to Mr. Randolph?

A. I am sorry. In preparation for, I believe, the unemployment compensation.

Q. And didn't Mr. Randolph inform you that subsequent to his conversation with Mr. Brakke that his shift was at 1:30 in the afternoon?

A. It may—he may or may not have pointed that out to me. I would have to look at that folder.

Q. Based upon your review of the documents today you did intend to remove letters to Mr. Brakke then prior to his having his annual leave completed?

A. That is correct.

Q. And Mr. Brakke upon receipt of this letter dated August 8, his remedy at that point was to pursue his rights through this process that we are going through now and through oral reply?

A. That is correct.

MR. BACH: No further questions.

MR. RUSSELL: Mr. Kupietz, any further questions of the witness?

EXAMINATION

BY MR. KUPIETZ:

Q. Yes. Do you have an opinion, Mr. Ciancanelli, as to whether Mr. Brakke was on strike on August 3 and August 4?

MR. BACH: You had better lay some foundation for that.

MR. RUSSELL: I will permit the question. I do not think foundation is required given the context of the questions in light of what the testimony has been.

THE WITNESS: I do not think I understand the question. Can you rephrase it?

BY MR. KUPIETZ:

Q. Okay, yes. Do you have an opinion as to whether Mr. Brakke was on strike on August 3 and August 4, just referring to for the sake of this question to those two days?

A. His failure to report for duty was the primary reason, yes.

MR. KUPIETZ: I have no further questions.

MR. RUSSELL: Mr. Bach.

EXAMINATION

BY MR. BACH:

Q. Yes. First of all would you define for me what constitutes participation in a strike?

A. Participation in a strike is not reporting for duty, withholding of services from an individual.

Q. Does it make any difference whether the person's appearance or failure to appear for work is voluntary or not?

A. I do not understand that, sir.

Q. Well, if somebody does not appear at work—

A. Yes.

Q. —not because of their free will or because of some intimidation or some medical reason, do you consider that person participating in a strike?

A. Based on the information provided by that individual about it, intimidation, harassment or medical, a further review of that could result in no action taken.

Q. Well, now Mr. Machnik did not appear on August 3 and August 4, did he?

A. No.

Q. And you did not fire Mr. Machnik, did you?

A. No.

Q. In fact you did not discipline him either, did you?

A. No, I did not.

MR. BACH: No further questions.

MR. RUSSELL: Mr. Kupietz?

MR. KUPIETZ: Nothing further.

MR. RUSSELL: That completes the testimony with respect to Mr. Brakke and we will move on to Mr. Carland.

Mr. Kupietz?

EXAMINATION

BY MR. BACH:

Q. Mr. Ciancanelli, Mr. Sellner was a trainee, was he not?

A. Yes.

Q. And wasn't he the youngest trainee at the facility?

A. I can only relate to the grade, GS-9.

Q. You sent him this letter dated August 7, 1981 notifying him of your intent to discharge him, is that correct?

A. Yes.

Q. And that letter was received by Mr. Sellner on August 8th, isn't that correct?

A. That is correct.

Q. All right. Now, this letter, this notice of intent to discharge him, that letter doesn't tell him that he can come back to work, does it?

A. No, it does not.

Q. It tells him that you intend to bar him?

A. That is correct.

Q. Now, this letter was received prior to Mr. Sellner's next regularly scheduled shift, wasn't it?

A. That is correct.

Q. And you had all these documents in your file when you made the decision to terminate Mr. Sellner?

A. That is correct.

Q. Who prepared this letter dated August 7, 1981?

A. The appropriate staff office that was in charge of the letters.

Q. So when you signed this letter, you didn't know what Mr. Sellner's schedule was, did you?

A. I knew what his schedule was and the annual leave was overlooked.

Q. So that was something that just slipped through the cracks?

A. Yes.

Q. Well, did you overlook it on August 7th? Did you overlook it when you made your decision on whatever the date was that you issued that letter?

A. Yes, I did.

Q. Now, at this oral reply that Mr. Sellner went to, he did represent himself, isn't that correct?

A. Yes.

Q. Did you talk to Mr. Kreger about Mark?

A. I can't recall specifically talking to Mr. Kreger about Mark.

Q. Didn't Mr. Kreger recommend further discussion in this case?

A. That is correct.

Q. And if I may quote Mr. Kreger, didn't he state that "Mark had been pushed around and forced by threats to stay away from his job to the point of rebellion"?

A. Yes.

Q. And didn't he also, if I may quote him, say, "I strongly request your consideration with reference to this man's job"?

A. That is correct.

Q. And you didn't talk to Mr. Kreger about this?

A. No, I did not.

Q. Did you talk to anyone at all about Mr. Sellner?

A. My discussions were—I had a brief discussion with Paul Needham.

Q. And that was because Mr. Sellner had been one of the trainees who had talked to Mr. Needham prior to August 3d, isn't that correct?

A. That is correct.

Q. Did you talk to him specifically about Mr. Sellner?

A. His name was mentioned, yes.

Q. But do you recall what it was you discussed as to him?

A. I just referenced the previous discussion with Needham and referenced Mr. Sellner.

Q. Did you make any effort to contact Mark during this period of time?

A. No, I did not.

Q. Or did you make any effort to have any of your people underneath you contact Mark?

A. No.

Q. Did you contact anyone whose name was mentioned in the letter of August 26th to you signed by Mark?

A. I discussed—

Q. Did you talk to Mr. Eldon Miller?

A. No.

Q. Did you talk to Mr. Leon Orr?

A. Yes.

Q. And when did you talk to Mr. Orr?

A. Exactly, I can't recall. It was prior to the decision.

Q. And what did you discuss with Mr. Orr?

A. I just—Mr. Orr did read this letter of Mr. Sellner's and I discussed Mr. Sellner personally with, I believe it was, Wayne—no, correction—forget that—just Mr. Orr.

Q. What did you discuss with Mr. Orr?

A. I had Mr. Orr review the letter and my discussion centered with Mr. Orr on the allegations that were made by Mr. Sellner.

Q. Could you summarize the discussion, if you could, please, with Mr. Orr?

A. He after reading—we talked about the statements made referencing Bruce Larson, and that's about the extent of the discussion.

Q. Did you make any effort to contact Mr. Randy Krug, whose name is also mentioned in here—

A. No, I did not.

Q. —as a corroborative witness? So if I understand you correctly, when you issued your discharge letter to Mr. Sellner, you had overlooked the issue of annual leave and regular days off?

A. That's correct.

Q. And when you made your decision to discharge Mr. Sellner, you didn't have any facts in your possession other than what you thought was his absence from his regular days of work to lead you to the conclusion that he was participating in a strike?

A. That's correct.

MR. BACH: Nothing else.

MR. RUSSELL: Mr. Kupietz?

MR. KUPIETZ: Yes.

EXAMINATION

BY MR. KUPIETZ:

Q. Just to make sure the record is clear, Mr. Ciancanelli, did Mr. Sellner have—was he scheduled to work August 3d, 4th and 5th—

MR. KUPIETZ: Well, I will withdraw that. We have already gone over that.

MR. RUSSELL: That is repetitious, yes.

MR. KUPIETZ: I have nothing more.

MR. RUSSELL: All right. That completes then the testimony with respect to Mr. Sellner. We will obtain testimony next from Mr. Ciancanelli with respect to Mr. Tigre.

MR. KUPIETZ: I will defer to Mr. Prock.

MR. RUSSELL: Okay. Mr. Prock, do you have any questions with respect to Mr. Tigre?

MR. PROCK: Yes, I do.

EXAMINATION

BY MR. PROCK:

Q. Mr. Ciancanelli, on or about August 3d, 1981, did you have an employee by the name of Lawrence J. Tigre?

A. That is correct.

Q. In what capacity was he employed?

A. Mr. Tigre was an Air Traffic Control Specialist, Full Performance Level Controller at the facility.

MR. PROCK: Mr. Bach, we have a proposed stipulation that Mr. Tigre was scheduled to work on August 3d from 800 to 1600 hours; on August 4th from 0630 to 1430; starting on the evening of August 4th and going through to August 5th, 2300 to 0700 hours; August 6th was a regular day off; August 7th was a regular day off; August 8th, he was scheduled to work . . .

. . . less harsh remedy, that is something less than discharge?

A. No.

Q. Now, you reinstated one person?

A. That is correct.

Q. That was Mr. Machnik?

A. That is correct.

Q. And he went through this oral reply procedure, isn't that correct?

A. That is correct.

Q. And you determined that he was on annual leave, isn't that correct?

A. Yes.

Q. And did he call you, personally?

A. Yes.

Q. When was this?

A. First of all, he called the office, the administrative office. They informed him to call me—correct that. Correct that.

MR. RUSSELL: Can you identify the date, please?

THE WITNESS: I can't recall the date. I believe it was on the 16th of August, when I first directed contact with Mr. Machnik by telephone.

BY MR. BACH:

Q. You had issued to him a notice of intent to remove?

A. Yes.

Q. And the day on which you issued that was apparently a day which he still had verified annual leave which had not been cancelled?

A. That is correct.

Q. So you didn't consider him a participant in the strike?

A. Would you go back to the last question where you said I issued a letter and he was on verifiable annual leave?

Q. You issued him a notice of intent to remove, a letter?

A. Yes.

Q. While he was either on annual leave or had a regular day off—I don't know which it was—isn't that correct?

A. The action I initiated against Mr. Machnik was taken on the premise that he was not on annual leave.

Q. I understand that—

A. Okay.

Q. —but he established to you that on the day in which this letter was sent, that he was on annual leave and had not been cancelled?

A. I can't recall a specific date he received it but it was initiated by me. Whether it was on a day off or not, I don't know.

Q. It was either a day off or annual leave?

A. Yes.

Q. And he pointed that out to you?

A. That's correct.

Q. And you confirmed that through his supervisor or someone?

A. That is correct.

Q. And then he was subsequently reinstated to his position, isn't that correct?

A. After the oral review and taking that into consideration and the fact that his annual leave was not cancelled, I issued a letter to him with a date for return to duty.

Q. Was he disciplined for being off at all?

A. I believe he had two days, the Monday and Tuesday—it was either Monday and/or Tuesday, he did fail to report for duty and no discipline was taken against him.

Q. Those days he didn't have annual leave in your estimation, is that correct?

A. I believe him to be absent on Monday morning.

Q. And on Monday morning, he was supposed to report to work and he did not, is that correct?

A. Yes.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ST. LOUIS REGIONAL OFFICE

Case Number: SL075281F0346
Decided on: January 25, 1983

DUANE R. ALLEN, et al.,[1]

Appellants,

v.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

Agency.

INTRODUCTION

By petitions timely filed, the appellants seek to appeal the actions of the agency which separated them from their positions of Air Traffic Control Specialist (Center) during August and September, 1981.

JURISDICTION

A federal employee may appeal any action to the U.S. Merit Systems Protection Board (the Board) which is appealable under law, rule, or regulation. 5 U.S.C. 7701(a) (Supp. IV

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[1] The 139 appellants whose appeals are treated in this initial decision constitute that portion of the *Duane R. Allen, et al.* consolidation, Case No. SL075281F0346, involving the Olathe, Kansas, Air Route Traffic Control Center (ARTCC), Olathe, Kansas. The names of the 139 appellants are identified in the appendix attached to this decision.

1980). An employee in the competitive service . . . plainly such an operational emergency, and the agency had sufficient reason to anticipate that it might occur and to take preventive measures to try to ensure an adequate workforce. Accordingly, I find that the agency did not violate the negotiated agreement by cancelling the annual leave of its employees in advance of the actual strike. This finding is made generally concerning the annual leave defenses raised by the appellants identified above, the majority of whom acknowledge that they were aware of their leave being cancelled. Several appellants contend, however, that they were actually on approved leave that had not been cancelled on days when they were charged with striking and AWOL.

Appellant Buchholz was charged with striking and AWOL beginning at 2:00 p.m. on August 3, 1981, and concluding on his deadline shift on August 9, 1981. Appellant Buchholz's Skeleton File, Tab 4(2). He contends that he was on approved annual leave from August 6 through August 20, 1981. However, he does not deny that his annual leave was cancelled for August 3, 4, and 5, 1981. Appellant Buchholz did not testify at the hearing. The appeal file contains a Command Post Contact Form dated August 1, 1981, and signed by C. L. Hulsey, which indicates that he telephoned appellant Buchholz at 6:58 p.m. on August 1, 1981, and advised him that his annual leave was cancelled for August 3, 4, and 5, 1981, and that he should report for work on his regular shift on August 3, 1981. Appellant Buchholz's Skeleton File, Tab 4(7). Mr. Hulsey did not testify. The appeal file contains no documentary evidence which would support a finding that appellant Buchholz was ever notified that the remainder of his leave (from August 6 through August 20, 1981) was cancelled. The watch schedule shows appellant Buchholz on annual leave and regular days off from August 6 through August 15, 1981. From August 16

through August 20, it contains undecipherable scribbling which might or might not indicate cancellation of appellant Buchholz's annual leave on those days. Appellant Buchholz's Skeleton File, Tab 4(7). The sign-in logs for the period August 3, 1981, through August 5, 1981, show appellant Buchholz's annual leave cancelled, but the sign-in log for August 6, 1981, shows his annual leave for that day as uncancelled. Finally, the sign-in log for August 9, 1981 (the last one presented), indicates that his annual leave for that day was cancelled. Appellant Buchholz's Skeleton File, Tab 4(7).

Under cross-examination, facility chief McQueen admitted that appellant Buchholz's situation was confusing, and that he could not explain why he was charged with missing his deadline shift on August 9, 1981, when the record contained documents which at best were ambiguous as to the status of his annual leave on that day and thereafter. Tr. 119-121, 161-167, 172.

In this case, I first find that appellant Buchholz did not report for work on three assigned shifts, August 3, 4, and 5, 1981, during the President's grace period. The Command Post Contact Form signed by Hulsey demonstrates that appellant Buchholz's annual leave for those days was cancelled. However, the agency has not proven that his annual leave for August 6, 1981, and for August 9, 1981, his deadline shift, was ever cancelled. I therefore find that he was charged with striking and AWOL when he was still on approved annual leave. His actual deadline shift, based on the evidence of record, was either August 16 or August 23, 1981, depending on the interpretation given the scribbling described, *supra*. Therefore, I find that appellant Buchholz did not receive the full benefit of the grace period. His removal was proposed prior to his actual deadline date, and he also received the notice of proposed removal prior to that date.

I thus find that appellant Buchholz has successfully rebutted the agency's *prima facie* case against him.

Appellant Tuller, who was charged with striking and AWOL for missing his deadline shift on August 16, 1981, did not testify and, therefore, has never denied that his annual leave was cancelled by the agency. In contrast, the agency provided a Command Post Contact Form dated August 15, 1981, which indicates that supervisor Ronald Moore talked to appellant Tuller on the telephone on that date, advised him that all leave was cancelled, ordered him to work at 8:00 a.m. on August 16, 1981, and told him that he must present himself ready, willing, and able to work or be considered to have participated in an illegal job action. Appellant Tuller's Skeleton File, Tab 4(7).

The agency did not call supervisor Moore to testify about his telephone conversation with appellant Tuller. However, the Command Post Contact Form is clear and unequivocal, and I find that it heavily outweighs appellant Tuller's silence. While appellant's counsel mentioned in his oral closing

. . .

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
BOSTON REGIONAL OFFICE

THOMAS J. ALLEN, et al.

v.

FEDERAL AVIATION ADMINISTRATION
BK075281F0250
INITIAL DECISION NO: SEE APPENDIX A
DATE: February 1, 1983

INTRODUCTION

Appellants whose names are listed in Appendix A (attached) appealed their removal by the Federal Aviation Administration, Boston Air Route Traffic Control Center (hereinafter Boston Center), Nashua, New Hampshire. In addition, appellants effectively amended their petitions on May 3, 1982, to include an appeal from an alleged suspension during the period between the issuance of their notices of proposed removal and the effective date of their removal as stated in their dismissal letters.

JURISDICTION

Appellants are entitled to appeal their removal in accordance with 5 U.S.C. 7513(d) and 7701(a) on the basis that they were employees as defined in 5 U.S.C. 7511(a)(1)(A) and the action is one which is covered by 5 U.S.C. 7512.

THE REMOVAL

By letters addressed to each appellant, Mr. James I. Lucas, Chief, Air Traffic Division, New England Region, Federal Aviation Administration, proposed their removals for the following reasons:

1. Participation in a nationwide strike by air traffic controllers which began at 7:00 a.m. on August 3, 1981.

2. Unauthorized absence from scheduled tours of duty which began on or after 7:00 a.m. on August 3, 1981.

Appellants were given a shortened notice period of seven calendar days (the customary notice period is 30 calendar days) and the same time in which to reply to the proposal orally and in writing. With virtually no exceptions, appellants wrote to Mr. Lucas shortly after receipt of this proposal and requested an extension of time, citing several reasons. Appellants requested therein that the FAA provide them with a copy of all materials relied on by the agency to support its proposed action and also requested an opportunity to present an oral reply. By another letter, in most cases dated the same day as the request for an extension of time, appellants filed a written reply which constituted a general denial of the charges. Further, appellants indicated that they were submitting this reply in the event their request for an extension of time was not granted.

In letters which followed soon thereafter, Mr. Lucas denied their request for an extension of time and informed each appellant of the date and time his oral reply was scheduled to be heard. Subsequently, with few exceptions, appellants submitted written withdrawals of their request for an oral reply and repeated their general denial of the charges. The FAA then issued written decisions to remove appellants, signed by either Mr. Lucas or Mr. . . .

f. *G. Peter Moody*

Appellant Moody was charged with unauthorized absence and participation in a strike on August 3, 1981. Appellant Moody admitted that he was scheduled to work, did not re-

port and participated in a strike on that date. Tr. at 1321. Therefore, I must sustain the charge of participation in the strike on August 3, 1981 against him.

As just discussed, I have sustained both charges against appellants. I must next determine whether the agency's selection of the penalty of removal was appropriate. The agency bears the burden of persuasion on this issue. *Douglas v. Veterans Administration*, MSPB Docket No. AT075299006 (April 10, 1981) Tr. at 35, 36.

The agency argued that because 5 U.S.C. 7311(3) prohibits an individual from holding a position in the federal government if he participates in a strike against the government, the agency could not have selected a penalty other than removal and did not have to consider any mitigating factors. *Cf.* 5 U.S.C. 7513; *Douglas, supra.*

In contrast, appellants argued that despite 5 U.S.C. 7311(3), the Board does have the authority to mitigate the penalty in these cases. Further, appellants argued that under the principles enunciated in *Douglas*, several potentially mitigating factors must be considered, including the following:

the employee's past disciplinary record;

the employee's past work record;

the effect of the offense upon the employee's ability to perform at a satisfactory level;

the consistency of the penalty with those imposed upon other employees for the same or similar offense;

the potential for the employee's rehabilitation;

mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment or bad faith, malice or provocation on the part of others involved.

Appellants further argued that while the existence of most of these factors would generally depend on the unique facts of each individual case, at least two factors were common to all appellants.

The first common factor, according to appellants, was the "gross disparity" in the treatment of strikers who returned to work by the President's deadline and those who did not. Appellants asserted that the former were neither removed nor disciplined despite participation in the strike while appellants were dismissed. In appellants' view, such treatment is arbitrary and capricious and is grounds for mitigation.

Appellants' argument of unequal treatment must fail, except in relation to appellant Moody. The principle of "like penalties for like offenses" is a basic tenet of federal personnel law, and the Board has recognized that an agency's selection of penalty is appropriate only if it adheres to this principle. *See Douglas* at 35. However, the basic premise of this concept is that employees who are similarly situated will receive similar penalties. With the exception of appellant Moody, who will be discussed separately, appellants have not established that strikers who met the President's deadline were similarly situated to appellants. Those who met the deadline returned to work; appellants did not. Those who met the deadline abandoned the strike; appellants did not. In addition, as discussed *supra*, appellants have not demonstrated that the FAA failed to communicate this deadline to appellants. Under those circumstances, I find that the difference in treatment was reasonable, and neither arbitrary nor capricious. Thus, the principle of "like penalties for like offenses" is inapplicable here.

However, appellant Moody presents a different case. Appellant Moody testified at the hearing. He testified that he was on strike on August 3 and 4, 1981 and that his regularly

scheduled days off were August 5 and 6, 1981. Tr. at 1322, 1326. He said that up until the morning of August 7, 1981, he understood that under the agency's implementation of the President's grace period, he would be afforded until 3:00 p.m. to return to work. He related that on Friday morning (August 7) Jack Smith, a fellow crew member who shared the same work schedule, tried to enter Boston Center at 9:30 a.m. to get his retirement papers, but was turned away and told he was fired. Appellant Moody testified that Mr. Smith then came back to the union hall about 10:00 a.m. and announced what had happened to those assembled there. Tr. at 1223-24.

Appellant Moody went on to explain that after Mr. Smith made this announcement, appellant Moody went home for lunch and to tell his wife what had happened. He said that when he arrived, there was a first class letter in the mail from the FAA, which proposed his removal. He said that he then concluded, in the context of Mr. Smith's announcement, he had been mistaken about his deadline, that he would not be permitted to return and would be fired. Appellant also admitted that as of Friday morning, he had not yet made a decision whether or not he would return for his 3:00 p.m. shift. Tr. at 1322.

The agency offered no rebuttal to this testimony, but noted that in correspondence between the FAA and appellant, as well as in his petition for appeal, appellant Moody had stated that he received his proposal to remove on August 10, 1981, not August 7, 1981. However, appellant explained that he used this date because that was the day he received a certified copy of his proposal removal. This fact was corroborated in the agency's response to appellant's petition for appeal, which contains a copy of this signed receipt at Tab 2. Appellant Moody further explained that he used this date because the

PATCO 1 department wanted certified copies of the letters he had received. Tr. at 338.

Appellant Moody's unrebutted testimony was direct, precise and credible in all respects. Thus, I find that the Smith incident did occur as described by appellant. Furthermore, I find that he did receive his proposed removal, by first class mail on August 7, 1981. Therefore, I must conclude that on Friday noontime, August 7, 1981, appellant reasonably believed that he would not be permitted to return to work for his 3:00 p.m. shift, due at least in part, to the FAA's own actions. Accordingly, I must further conclude that the agency is estopped from removing appellant for his participation in a strike on August 7, 1981, because he was not afforded a fair chance to meet the President's deadline, as implemented by the agency. Consequently, I find no penalty should be imposed, consistent with those cases where controllers were permitted to return. *See Schwartz v. Federal Aviation Administration,* Initial Decision No. BN075281F0689 (September 16, 1982); *Ramirez v. Department of the Air Force,* MSPB Docket No. DA07528010067 (December 2, 1981).

The remaining appellants asserted that the second common mitigating factor related to "unusual job tensions and provocations." They contended that the FAA was at least in part to blame for creating the situation that may have led to the illegal strike. Consequently the ultimate penalty of removal should not be imposed. Appellants offered no evidence of any probative value to support their claim that the FAA provoked and created the situation . . .

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

IN THE MATTER OF:

Gregory K. Barnett	Decision No. CH075281F0953
Harry R. Brinkman	Decision No. CH075281F1084
John R. Burge	Decision No. CH075281F1132
James D. Call	Decision No. CH075281F1157
Robert B. Carpentier	Decision No. CH075281F1181
William C. Clements, Jr.	Decision No. CH975281F1238
Jerry L. Coleman	Decision No. CH075281F1257
James M. Collins, Jr.	Decision No. CH075281F1262
Thomas W. Coy	Decision No. CH075281F1303
Jerome T. Cutright	Decision No. CH075281F1335
Albert L. Doyle	Decision No. CH075281F1416
Curtis Harmon	Decision No. CH075281F1766
Donald W. Knuth	Decision No. CH075281F2083
Harold C. Sherven	Decision No. CH075281F2929
Paul F. Wycough	Decision No. CH075281F3329
Ronald L. Busch	Decision No. CH075281F1147
Robert E. Collier	Decision No. CH075281F1259
Charles J. Davis, Jr.	Decision No. CH075281F1349
Robert D. Dunlap	Decision No. CH075281F1436
Zack D. Ellison	Decision No. CH075281F1467
James W. Engelbrecht, Jr.	Decision No. CH075281F1474
Duane A. Engle	Decision No. CH075281F1475
Marion L. Farnsley	Decision No. CH075281F1503
Andrew R. Fassett	Decision No. CH075281F1508
Stephen L. Felkins	Decision No. CH075281F1516
Mark D. Fitzgerald	Decision No. CH075281F1545
Peter J. Foltz	Decision No. CH075281F1561
Mabel K. Ford (Hart)	Decision No. CH075281F1565
Gary P. Gable	Decision No. CH075281F1596

Abbey M. Gross	Decision No. CH075281F1707
Lee D. Moore	Decision No. CH075281F2431
Duane D. Mustard	Decision No. CH075281F2470
Ronald J. Osmialowski	Decision No. CH075281F2565

v.

Department of Transportation
Federal Aviation Administration

Date: January 22, 1983.

INTRODUCTION

The above-named appellants filed timely appeals of actions of the Department of Transportation, Federal Aviation Administration removing them from their positions of Air Traffic Control Specialists at the Indianapolis Air Route Traffic Control Center in Indianapolis, Indiana.

JURISDICTION

The Board has jurisdiction over this matter under title 5 of the United States Code, Chapters 75 and 77. The appellants are entitled to appeal the agency's actions pursuant to 5 U.S.C. 7513(d) and 7701(a) on the grounds that they were employees as defined by 5 U.S.C. 7511(a)(1)(A) and that the action is one which is covered by 5 U.S.C. 7512.

SANCTIONS

Pursuant to 5 C.F.R. 1201.41(b)(9), all appellants, except for Mr. Call, who was in Australia, were ordered by the presiding official to appear and testify. None of them appeared. Such defiance, of a direct order of the presiding official exposes the individual to serious sanctions under 5 C.F.R. 1201.43. However, in view of the evidence presented from other sources, the presiding official concludes that it is unnecessary to reach the question of what is an appropriate sanction for the contemptuous behavior of these appellants.

ANALYSIS AND FINDINGS

An agency may take removal actions against employees ". . . only for such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a). The Board reviews whether the agency's reasons for taking an action are supported by a preponderance of the evidence and are for the requisite cause. 5 U.S.C. 7701(c)(1). Additionally, the Board considers and decides affirmative defenses wherein appellants allege that an appealed action should be overturned because it was based on harmful procedural error, prohibited personnel practices, and/or violation of law. 5 U.S.C. 7701(c)(2).

AGENCY'S CHARGES

In the appeals at issue, the agency stated in its notices of proposed action that the appellants' removals were being proposed because: (1) each appellant violated 5 U.S.C. 7311, which bars government employment for an individual who participates in a strike, and 18 U.S.C. 1918, which makes participation in a strike against the government a crime for which a sentence of imprisonment can be imposed; and (2) each appellant was absent without authorized leave on specified dates during the course of an illegal strike taking place in . . . the PATCO Collective Bargaining Agreement which was in force at the time (Appellant's Exhibit 14). This provision states: ". . . this leave shall not be cancelled or rescheduled, except for an operational emergency." (Appellant's Exhibit 14, p. 2). The agency conceded that no operational emergency was in effect on July 31, 1981, the time of the leave cancellations. However, Mr. Chavez testified that the strike was imminent, and that he anticipated that an operational emergency would occur on August 3, 1981 when the strike was scheduled to begin. Therefore, Mr. Chavez directed his supervisors to cancel all annual leave for the week of August 3 through

August 8, 1981 (Tr. 44, 64-65, 400, 519-520). The language of the contract does not state that an operational emergency must be in effect at the time of the cancellation of leave. It merely says that leave can only be cancelled for an operational emergency. I interpret the provision to allow the cancellation of leave when the operational emergency is imminent and forseeable. To interpret the contract as the appellant suggests would unduly limit the agency's ability to deal with anticipated operational emergencies. I find that the contract provision was intended to cover circumstances such as the instant one, therefore, no error occurred in the cancellation of the appellants' annual leave.

Appellant Sherven also contends that a valid leave cancellation must be through direct contact with the individual and that leaving a message with his wife was insufficient. In Mr. Sherven's case, supervisor Phil Link called Mr. Sherven's home, and, since he was not available, Mr. Link spoke with Mr. Sherven's wife and told her that Mr. Sherven's leave for August 3, 4, and 5 was cancelled. I see no error in this procedure. Furthermore, Mr. Sherven has not alleged that his wife failed to inform him of the leave cancellation, nor has he shown that he was otherwise harmed by this procedure.

However, Mr. Sherven had annual leave beyond August 5 which was not cancelled. He was scheduled for regular days off on August 6 and 7, and then had annual leave (coupled with regular days off) from August 8 through September 3. (Sherven's Exhibit 1, Tr. 525, 544-545). The facility chief candidly admits that the sending of the proposal to remove letter to Mr. Sherven was an error (T. 526). Even though Mr. Sherven was on strike and AWOL on August 3, 4 and 5, this occurred during the moratorium period declared by President Reagan since the August 5 shift was from midnight to 8:00 a.m. (Appellants Exhibit 5). Pursuant to

GENOT 128 (Agency Response, Tab. 5), Mr. Sherven had until the beginning of his next scheduled shift following the moratorium to report for duty. Because of his leave, Mr. Sherven's deadline shift was on September 4 (Tr. 525). By operation of the presidential moratorium and GENOT 128 the agency is estopped from removing Mr. Sherven. This estoppel only precludes removal and does not prevent the agency from disciplining Mr. Sherven for his unauthorized absences by imposing less severe penalties (e.g. a one year suspension).

The presiding official believes that such a penalty would be warrented for Mr. Sherven and others who engaged in striking during the moratorium period. However, the agency has chosen not to impose any discipline on those employees who struck during the moratorium *and* returned for their deadline shift. Mr. Sherven was not allowed to return for his deadline shift; not only was his removal *proposed* prior to September 4, it was also *final* prior to that date. (Agency Response, Tab. 4). Thus, to allow any discipline against Mr. Sherven, though clearly warranted, would violate the principle of like penalties for like offenses and would entail prohibited disparate treatment.

Appellant Brinkman alleges error in the cancellation of his sick leave of August 3 through August 5. I find no error in the cancellation of this leave and I find that Mr. Brinkman was able to perform at least administrative duties at that time. Therefore, I find that Mr. Brinkman was in fact on strike and AWOL on August 3, 4 and 5 (7:00 a.m. shift). Not only was Mr. Brinkman on strike himself, he encouraged and coerced other controllers to strike, threatened to break automobile windshields of non-striking controllers, and even threatened one controller with the use of an ax (Tr. 581-582).

However, Mr. Brinkman had annual leave and regular days off from August 6 through September 3. The agency never attempted to cancel this leave, nor did it wait until after Mr. Brinkman's deadline shift to propose his removal. The removal was proposed on August 8 and was effective on September 3. As discussed above with regard to Mr. Sherven, Mr. Brinkman has established harmful procedural error and estoppel, and no penalty can be imposed because such action would constitute disparate treatment.

The appellants contend that the decision to fire them was made by the President of the United States on or before August 3, 1981, and that they were fired by order of the President without regard to the particular facts and circumstances of their individual cases. The evidence of record indicates, however, that although the agency took the position nationally that all employees who were found to have participated in the strike would be terminated, it delegated to the individual deciding officials the sole responsibility for determining which of its employees had in fact participated in the strike (Appellants' Exhibit 11, GENOT 141). Moreover, there is no evidence to support the hypothesis that the President personally ordered or effected the removal of any individual appellant. GENOT 141 specifically directs the deciding official to use his judgment in determining whether or not any particular employee was guilty of the charges stated in the notice. The mere fact that none of these appellants was returned to work does not show that the deciding official had no authority to exercise discretion. I conclude that there is no merit to the appellants' claim that they were terminated by the president.

. . . penalty for striking against the government, the charge that most clearly warrants the removal actions in these cases.

(*See* Appellant's Exhibit 13). Therefore, I find that the penalty of removal is appropriate for each appellant in this consolidation, except for Call, Sherven and Brinkman.

As discussed earlier, no penalty is warranted for appellant Call because he was not on strike or AWOL during the period charged. Also, no penalty can be imposed on appellants Brinkman and Shervan because such would constitute disparate treatment.

DECISION

Regarding appellants James D. Call, Harry R. Brinkman, and Harold C. Sherven: the agency's decisions concerning the allegations of striking and AWOL are reversed, and the agency decisions removing these appellants are reversed. The agency is hereby ordered to cancel its actions removing these appellants and furnish to the Chicago Regional Office of the Board a copy of the personnel action form documenting the required correct action within twenty (20) calendar days after this decision becomes final.

The agency's decisions concerning the allegations of striking and AWOL of all appellants except Call, Brinkman, and Sherven are affirmed. The removals of all appellants except Call, Brinkman, and Sherven are sustained.

Any party seeking enforcement of a final decision of the Board may file a petition for enforcement with the regional office that rendered the initial decision. Such petition should be directed to the Regional Director and must comply with the requirements of 5 C.F.R. 1201.181(d).

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on Feb. 26, 1983 unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to this appeal or the Director of the Office of Personnel Management may file a petition for review of this

decision with the Merit Systems Protection Board. The petition must identify specifically the exception taken to this decision, cite the basis for the exception, and refer to applicable laws, rules, or regulations.

The petition for review must be filed with the Secretary to the Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419 no later than thirty-five (35) calendar days after the issuance of the initial decision, cite the basis for the exception, and refer to applicable laws, rules, or regulations.

The Board may grant a petition for review when a party supplies written argument and supporting documentation which tends to show that:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(2) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

Pursuant to 5 U.S.C. Section 7703(b) (1), (as modified by Section 127 of the Federal Court Improvement Act of 1982, as codified at 28 U.S.C. Section 1295(a) (9)) the appellant has the right to seek judicial review of the Board's final decision on this appeal. A petition requesting such review must be filed with the U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20005, no later than 30 days after appellant's receipt of the Board's final order or decision.

For the Board:

JOHN H. PLEUSS
Presiding Official

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

IN THE MATTER OF:

Joseph H. Gray	Decision Number: CH075281F1685
Jerome N. Schiltgen	Decision Number: CH075281F2851
Terry W. Gloege	Decision Number: CH075281F1657
David J. Patten	Decision Number: CH075281F3384

v.

Department of Transportation
Federal Aviation Administration
Date: October 15, 1982

INTRODUCTION

By petitions filed between September 9 and October 14, 1981, the above-named appellants appealed actions whereby the Department of Transportation, Federal Aviation Administration, Minneapolis Air Route Traffic Control Center, Farmington, Minnesota, removed them from their positions as Air Traffic Control Specialists. Mr. Gray was removed effective August 29, 1981, Mr. Schiltgen effective September 29, 1981, Mr. Gloege effective September 5, 1981 and Mr. Patten effective September 11, 1981. Each appellant seeks to have his removal action set aside.

JURISDICTION

The Civil Service Reform Act of 1978, as codified in title 5 of the United States Code, grants federal employees the right to appeal to the Merit Systems Protection Board from an action appealable under any law, rule, or regulation. 5 U.S.C. 7701(a).

The appellants, who were non-probationary employees in the competitive service, have both a statutory and a regulatory right of appeal to the Board from their removal actions. 5 U.S.C. 7511(a)(1)(A), 7512, 7513(d), and 5 C.F.R. 752.401(a) and (b)(1), 752.405(a).

ANALYSIS AND FINDINGS

An agency may take a removal action against an employee ". . . only for such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a). The Board reviews whether the agency's reason(s) for taking an action is supported by a preponderance of the evidence and is for the requisite cause. 5 U.S.C. 7701(a)(1), 5 C.F.R. 1201.56(a). Additionally, the Board considers and decides affirmative defenses wherein appellants allege that an appealed action must be overturned because it was based on harmful procedural error, prohibited personnel practices, and/or violations of law. 5 U.S.C. 7701(c)(2), and 5 C.F.R. 1201.56(b).

. . . duty on August 5. Accordingly, I find that appellant Gray failed to rebut the agency's *prima facie* showing that he participated in the PATCO strike on August 5, 1981. Therefore, I find that the agency supported its charge that appellant Gray so participated by a preponderance of the evidence, and the charge is sustained.

Appellant Schiltgen offered rebuttal to the agency's charge of participating in a strike by claiming that: (1) the agency erred in attempting to remove him while he was on approved leave; and (2) the agency's erroneous attempt to remove him precluded him from reporting for duty on his first scheduled shift following his leave period. The evidence supporting appellant Schiltgen's claim is not in dispute. Both the Center Chief (who was the deciding official) and the appellant agreed that the appellant had regular days off and approved annual leave

from August 4 through August 19, 1981. They further agreed that the Center Chief believed that the appellant's leave had been cancelled on August 10, 1981, and as a result the agency issued the appellant a proposed removal letter on August 10, 1981. The Center Chief and the appellant both testified that once an employee was issued a notice of proposed removal, the Minneapolis ARTCC did not permit that employee to report for work on any subsequent shift. The Center Chief and appellant Schiltgen also testified that after the appellant's oral reply on August 28, 1981, the agency determined that the appellant's leave was not cancelled and that the appellant had not been scheduled to report for work until August 20, 1981. Tr. 37-40, 87-89, 100, and 166-167. Appellant Schiltgen was then issued a second notice of proposed removal on September 11, 1981, based on his alleged striking and absence without leave for failure to report for duty on August 20, 1981. *See* response to petition, Tab 1.

My review of the record reflects that the agency's policy did not permit appellant Schiltgen to return to work on August 20, 1981, because it had issued him a proposed notice of removal on August 10, 1981. *See* Appellant Schiltgen's Hearing Exhibit #3. The agency did not cancel its August 10 notice to appellant Schiltgen until September 11, 1981, a date well after the 20th of August, the date the agency now claims the appellant was participating in a strike. I find that the uncontroverted evidence of record shows that the agency did not permit the appellant to report for work on August 20. The appellant testified that at no time did he refuse to provide services to his employer (Tr. 168). The agency has provided no evidence that the appellant was participating in a strike on August 20, 1981. The agency did, however, present testimony which indicated that the appellant was seen picketing some-

time subsequent to the original removal proposal (Tr. 184), but this was during a period when, by the agency's own testimony, he was being barred from working. His picketing activity has not been shown to be relevant to his absence from work on August 20 for two reasons: 1) it occurred during a period when he was on annual leave; and 2) it occurred during a period when he was under an erroneous notice of proposed removal.

Under these circumstances, the agency has not established that the appellant was striking, as charged, on August 20, 1981. Moreover, I find no material difference between appellant Schiltgen's case and the case of a Mr. Machnik who was returned to duty at the center after making an oral reply indicating he was on annual leave during the time he was charged with being on strike. (Tr. 94-96). Accordingly, I find that the agency has not shown by a preponderance of the evidence that appellant Schiltgen participated in a strike and that charge is not sustained.

With respect to appellant Gloege, the parties agreed that the appellant was scheduled for the 9:00 a.m. shift on August 3, the 6:30 a.m. and 11:00 p.m. shifts on August 4, regular days off on August 5 and 6, and the 4:00 p.m. shift on August 8, 1981. They also agreed that he failed to report to work for any of the aforementioned shifts. Tr. 121-122, 204. Appellant Gloege testified that he was a recovered alcoholic from May of 1979 until the first week of August of 1981. He further testified that the stress of the impending strike was too much for him to handle and that he was drunk from sometime on August 2 until the afternoon of August 5, 1981. When he sobered up on the 5th, appellant Gloege testified, he was told by his wife about the President's statement giving Controllers 48 hours to report for duty. Upon hearing of that statement,

he testified, he considered himself fired as of the afternoon of August 5. The appellant testified he was on a bender, not on strike. Tr. 203-204, 208. Appellant Gloege admitted that he made no attempt to contact the agency concerning his status on or before August 8, 1981. He further admitted that he made no mention of his drinking problem in his oral and written replies to the agency prior to the agency's decision to take removal action. He also testified that he had an excellent attendance record and that he had not required leave in the past because of his alcohol problem. Tr. 209-210.

I do not find persuasive appellant Gloege's claim that he was on a bender and not on strike. The evidence reflects that under GENOT 1/127 the appellant was not required to report for work until August 8, 1981 (Tr. 122). By his own testimony, appellant Gloege admitted that his bender was over on August 5. He further admitted that he made no attempt to contact the center concerning his work status after recovering from his drinking on August 5. He also admitted that he did not miss work in the past due to his drinking problem and that he disclosed no such problem when responding to the agency's proposed removal notice. Accordingly, I find that appellant Gloege failed to rebut the agency's *prima facie* showing that he participated in the PATCO strike on August 8, 1981. Therefore, I find that the agency supported its charge that appellant Gloege so participated by a preponderance of the evidence and the charge is sustained.

Appellant Patton claims to have been on annual leave on August 4, 1981, and that he was not on strike. The Center Chief's testimony states that . . .

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Docket Number DA075281F0713

JOHN C. KETCHEM
v.
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

ORDER

By motion filed on October 8, 1982, former air traffic controller appellants represented by Richard J. Leighton request clarification of the Board's May 28, 1982, Opinion and Order in the above captioned appeal.[1] Specifically, these appellants ask whether, in taking official notice under 5 CFR 1201.67, that a strike called by the Professional Air Traffic Controller's Organization "occurred from August 3 through August 6, 1981 . . .," the Board intended the officially noticed period to terminate at 8 a.m. on August 6, 1981. Interwoven with the specific clarification requested is an inquiry as to whether the Board concluded that the strike terminated at 8 a.m. on August 6, 1981.

In our view, the Board's conclusions regarding the aforecited inquiries are clearly set forth in the May 28, 1982 Opinion and Order. At page 9 of such Opinion and Order. The Board stated:

> We . . . take official notice, subject to the right of refutation, that an unlawful strike of air traffic con-

[1] The Department of Transportation, Federal Aviation Administration filed a Reply to the Motion for Clarification on October 19, 1982.

> trollers commenced on August 3, 1981, and was still in progress on August 6, 1981. Thus, where an employee like the appellant is charged with participation in the strike on dates subsequent to August 6, 1981, the agency bears the burden of proving by direct evidence that a strike was in fact in progress on the date charged. . . .

Nowhere in that Order did the Board limit its taking of official notice to any particular hour on August 6, 1981, nor purport to make any finding as to the date of termination of the strike. Nor does the official notice taken by the Board in the Order of May 28, 1982 in any way relate to the agency's burden of proof of any individual appellant's participation in the strike regardless of the date charged. Such burden includes proof of unauthorized absence which in turn requires specific proof that the agency would have allowed an individual appellant to return to work in cases where that point is in issue. The May 28, 1982 Order relates only to the taking of official notice of the existence of a strike from August 3, 1981 through August 6, 1981, and serves merely, in the absence of refutation, to relieve the agency of the burden of introducing evidence to prove such fact prior to proving strike participation.

Accordingly, the motion for clarification filed by the former air traffic controller appellants represented by Richard J. Leighton is hereby DENIED to the extent that it requests a formal clarification by revision of the Board's May 28, 1982 Opinion and Order in this appeal.

For the Board:
ROBERT E. TAYLOR
Secretary

Date: November 23, 1982.
Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

IN THE MATTER OF:

Gary A. Bakken	Decision Number: CH075281F0933
George A. Barbes, Jr.	Decision Number: CH075281F0946
George E. Bartlett	Decision Number: CH075281F0960
Gerald J. Berent	Decision Number: CH075281F0987
Ronald W. Berfelz	Decision Number: CH075291F0991
Daniel L. Bishop	Decision Number: CH075281F1012
Karen C. Brickley	Decision Number: CH075281F1078
Daniel F. Capetz	Decision Number: CH075281F1166
Richard C. Carrick	Decision Number: CH075281F1184
Thomas D. Collopy	Decision Number: CH075281F1267
Benton S. Coons	Decision Number: CH075281F1279
Terry L. Crane	Decision Number: CH075281F1309
James H. Croston	Decision Number: CH075281F1320
Richard E. Dahlen	Decision Number: CH075281F1339
Robert F. Doyle, Jr.	Decision Number: CH075281F1420
Jack R. Eberlein	Decision Number: CH075281F1446
Dean R. Ekegren	Decision Number: CH075281F1460
Robert B. Emerton	Decision Number: CH075281F1471
John D. Erickson	Decision Number: CH075281F1481
Richard C. Erickson	Decision Number: CH075281F1482
Robert P. Finn	Decision Number: CH075281F1536
Mark R. Fox	Decision Number: CH075281F1572
Robert C. Fox	Decision Number: CH075281F1573
Robert L. Garland, Jr.	Decision Number: CH075281F1619
Terrence L. Gerten	Decision Number: CH075281F1640
Robert M. Gorshe	Decision Number: CH075281F1672
Gary V. Gronfor	Decision Number: CH075281F1705
Madison C. Hamrick	Decision Number: CH075281F1749

James J. Hebert	Decision Number: CH075281F1790
Jeffrey S. Hennings	Decision Number: CH075281F1813
Richard J. Herrman	Decision Number: CH075281F1830
James C. Holmstead	Decision Number: CH075281F1871
John L. Horrigan	Decision Number: CH075281F1881
Leon M. Horst	Decision Number: CH075281F1882
Bruce E. Huff	Decision Number: CH075281F1903
Andrew P. Jaeger, Jr.	Decision Number: CH075281F1930
Larry G. Jensen	Decision Number: CH075281F1946
Jay D. Johnson	Decision Number: CH075281F1958
Kathryn A. Johnson	Decision Number: CH075281F1960
Frederick M. Johnston	Decision Number: CH075281F1971
William M. Jones	Decision Number: CH075281F1978
Lowell J. Jungers	Decision Number: CH075281F1986
Ronald A. Kabat	Decision Number: CH075281F1989
Danny M. Kagol	Decision Number: CH075281F1995
Thomas R. Kniefel	Decision Number: CH075281F2080
Russell O. Koerner	Decision Number: CH075281F2090
Glenn P. Koppin	Decision Number: CH075281F2100
Alan I. Lamden	Decision Number: CH075281F2153
Nancy B. Lamden	Decision Number: CH075281F2154
Bruce W. Larson	Decision Number: CH075281F2171
Craig R. Licari	Decision Number: CH075281F2209
John F. Lloyd	Decision Number: CH075281F2225
Kathleen J. Luce	Decision Number: CH075281F2251
Ronald J. Maier	Decision Number: CH075281F2276
John C. Matschiner	Decision Number: CH075281F2312
Raymond S. Mattson, Jr.	Decision Number: CH075281F2315
Mark R. McDonald	Decision Number: CH075281F2341
Donald R. Mercado	Decision Number: CH075281F2378
David L. Miller	Decision Number: CH075281F2396
Gary L. Morse	Decision Number: CH075281F2445

Janice L. Nielsen	Decision Number: CH075281F2510
Robert C. Norman	Decision Number: CH075281F2521
Thomas A. Ollhoff	Decision Number: CH075281F2548
David C. Olson	Decision Number: CH075281F2552
Russell E. Olson	Decision Number: CH075281F2558
William L. Olsonoski	Decision Number: CH075281F2559
David M. Pfister	Decision Number: CH075281F2627
Dean H. Rickels	Decision Number: CH075281F2732
John L. Riedner	Decision Number: CH075281F2737
Clifton D. Rodahl	Decision Number: CH075281F2773
Stephen J. Roncone	Decision Number: CH075281F2788
Richard J. Roy	Decision Number: CH075281F2805
Richard W. Samuelson	Decision Number: CH075281F2827
Donald G. Sawyer	Decision Number: CH075281F2838
Richard W. Scheid	Decision Number: CH075281F2847
Mark W. Schmit	Decision Number: CH075281F2862
Neil C. Schmitt	Decision Number: CH075281F2866
Bradford R. Schultz	Decision Number: CH075281F2885
Jeffrey T. Suchomel	Decision Number: CH075281F3061
Allend W. Templeton	Decision Number: CH075281F3092
Thomas E. Tesmar, Jr.	Decision Number: CH075281F3096
Terry Thraen	Decision Number: CH075281F3117
Mary F. Tomich	Decision Number: CH075281F3133
David M. Walz	Decision Number: CH075281F3224
Clarence M. Whipple, Jr.	Decision Number: CH075281F3261
William K. Whitlow	Decision Number: CH075281F3268
Edward P. Woolford, III	Decision Number: CH075281F3320
Michael J. Yeager	Decision Number: CH075281F3330
Patrick H. Zimick	Decision Number: CH075281F3348

v.

Department of Transportation
Federal Aviation Administration

Date: January 15, 1983.

INTRODUCTION

By petitions timely filed between September 8 and October 12, 1981, the above named appellants appealed actions whereby the Department of Transportation, Federal Aviation Administration, Minneapolis Air Route Traffic Control Center, Farmington, Minnesota, removed them from their positions as Air Traffic Control Specialists. The effective date of removal of each appellant is set forth opposite their respective names in the appendix to this decision. The appellants seek to have these removal actions set aside.

JURISDICTION

The Civil Service Reform Act of 1978, as codified in title 5 of the United States Code, grants federal employees the right to appeal to the Merit Systems Protection Board (hereinafter referred to as the Board), from an action appealable under any law, rule, or regulation. 5 U.S.C. 7701(a) (1980). The appellants, at the time of their removal, occupied non-probationary positions in the competitive service as full performance Air Traffic Control Specialists or as Developmental Air Traffic Control Specialists. Therefore, they have both a statutory and a regulatory right of appeal to the Board from their removal actions. 5 U.S.C. 7511(a)(1)(A), 7512, 7513(d) (1980); and 5 C.F.R. 752.401(a) and (b)(1), 752.405(a) (1981).

ANALYSIS AND FINDINGS

Under 5 U.S.C. 7701(c)(1), the agency's decision to remove the appellants must be sustained by the Board if it was taken for proper cause and is supported by a preponderance of the evidence. 5 C.F.R. 1201.56(a). An agency may take a removal action against an employee ". . . only for such cause as will promote the efficiency of the service." 5 U.S.C. 7513 (a).

Moreover, the agency's decision may not be sustained if the appellants can show harmful error in the application of the agency's procedures in arriving at its decision; can show that the decision was based on a prohibited personnel practice under 5 U.S.C. 2302(b); or can show that the decision was not in accord with law. 5 U.S.C. 7701(c)(2) and 5 C.F.R. 1201.56(b).

AGENCY CHARGES

The agency's advance notices to the appellants stated two reasons for their proposed removal. First, each appellant was charged with participation in a strike against the United States Government beginning on specified dates on or after August 3, 1981, in violation of 5 U.S.C. 7311, which bars government employment for an employee who participates in such strike activity, and 18 U.S.C. 1918, which makes participation in a strike against the government a crime for which a sentence of imprisonment can be imposed. Second, each appellant was charged with absence from assigned duty without leave (AWOL) on specified dates on or after August 3, 1981. The agency's decision notices stated that its charges warranted the removal of appellants from their positions in the federal service.

With respect to its first charge, the agency must demonstrate by a preponderance of the evidence both the existence of a strike and appellants' participation therein. *See Jones v. Tennessee Valley Authority*, MSPB Order No. AT07528010300 (February 19, 1982); and *Duckett, et al. v. Tennessee Valley Authority*, MSPB Order No. AT07528010325 (February 19, 1982). The agency may establish a *prima facie* case of an employee's voluntary participation in a strike by demonstrating: 1) that a strike was called at the facility where the employee worked; and 2) that the employee failed to appear for sched-

uled duty while the strike was in progress. *Schapansky v. Department of Transportation, Federal Aviation Administration*, MSPB Order No. DA075281F1130 (October 28, 1982), at 6.[1] An appellant is afforded the opportunity to rebut the agency's *prima facie* showing of strike participation, however, absence of rebuttal evidence or the overriding of rebuttal evidence by the agency must result in a finding that the agency has met its burden of proof with respect to the charge of strike participation. *See Schapansky*, at 6.

Accordingly, the agency must demonstrate by a preponderance of the evidence that the alleged strike called by the Professional Air Traffic Controllers Organization (hereinafter referred to as PATCO), the exclusive bargaining representative of the appellants herein (Agency Exhibit No. 5, Article 2, Sections 1 and 2) was in progress on the dates of appellants' charged absences from duty without authorization. Based on the Board's Order in *Ketchem v. Department of Transportation*, . . .

As noted above, I find unpersuasive appellant Mark Fox's testimony that he attempted to report for work between 9:40 and 10:00 a.m. on Wednesday, August 5, 1981. Mr. Fox, a union representative for members of his crew (Tr. 754), admitted that he did not speak with the agency's gate guard to seek access to the Minneapolis Center facility that morning, and that he did not otherwise contact or attempt to contact facility management. (Tr. 752). Mr. Fox failed to testify that

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[1] *Jones* and *Duckett* concern charges of strike participation in violation of 5 U.S.C. 7311 and a collective bargaining agreement. Noting the Board's clarifying statement in *Schapansky* that evidence of appellants' presence among picketers need not always be demonstrated, I find persuasive the Board's reasoning in these cases concerning the factors necessary to establish a *prima facie* showing of strike participation.

he saw the gate guard deny entry to any other controller attempting to report for work that morning. He stated that he witnessed only part of a conversation between the gate guard and an unidentified individual in which the guard stated, "no you cannot come in; do you really want to come in?" Mr. Fox admitted that "both parties" to this exchange were laughing. (Tr. 752). No information was afforded by Mr. Fox to show that the guard directed these comments to an individual who was seeking to gain entry to the facility to report for work. Accordingly, I find that appellant Mark Fox failed to rebut the agency's *prima facie* showing that he participated in a strike on his deadline date of August 5, 1981. Therefore, I find that the agency has supported by a preponderance of the evidence its charge that this appellant so participated and the charge is sustained.

Appellant Dean Rickels testified that the agency prevented him from reporting for his next assigned shift following his vacation by erroneously attempting to remove him while he remained on approved leave. Center Chief Ciancanelli (the deciding official in Mr. Rickels' case) and the appellant agree that appeliant was scheduled for regular days off and annual leave from August 3, 1981 through August 12, 1981. Mr. Ciancanelli further admits that appellant's leave remained uncancelled throughout this period. (Tr. 280). Mr. Ciancanelli offered no explanation for issuing Mr. Rickels' first notice of proposed removal on August 7, 1981, which was received by appellant on August 8, 1981, charging that Mr. Rickels failed to report for "scheduled" duty beginning on August 3, 1981. (Tr. 280). A second letter cancelling the first, but containing the same charge, was issued by Mr. Ciancanelli to Mr. Rickels on August 13, 1981 to correct an erroneous statutory citation. (Agency response to petition, Tab 1). Mr. Rickels' credible

testimony establishes that he notified the agency of his annual leave status in his oral reply on August 20, 1981. (Tr. 556). Following his oral reply, a third letter, dated September 11, 1981, proposing appellant's removal and expressly cancelling the second letter was issued based on appellant's alleged strike participation and absence without leave for failure to report for duty beginning on August 13, 1981.

The record establishes that appellant Rickels was effectively locked out of the Minneapolis ARTC Center prior to his August 13, 1981 deadline shift when the agency placed him in a non-duty, non-pay status after the issuance of his first notice of proposed removal on August 7, 1981. (*See* Parties' stipulation, sentence 2, Tr. pp. 7 and 8; Appellant Exhibit 2, GENOT 128; and Ciancanelli, Tr. 63). The agency did not cancel the charges contained in its August 7 and 13, 1981 notices to Mr. Rickels until September 11, 1981, four weeks after the date the agency presently claims Mr. Rickels participated in the PATCO strike. My review of the record further finds that the Minneapolis Center's policy precluded the return to work of controllers receiving a notice of proposed removal until after they explained, in the oral response meeting, their reasons why the agency's charges were invalid. Operation of this policy, which was also communicated to Mr. Rickels' union representative (Tr. 63), is illustrated by reference to the case of employee Machnik who was instructed by Mr. Ciancanelli to "state his case to the oral reply official" relative to the agency's allegedly erroneous computation of his deadline date and premature issuance of a proposed removal notice. Subsequent to his oral reply, Mr. Machnik, whose case is not materially different from that of appellant Rickels, was reinstated. (Tr. 72). Accordingly, my review of the record finds that the agency has not established that appellant Rickels was

striking on August 13, 1981 while he was in a non-pay, non-duty status. No evidence was adduced by the agency to show why, upon learning of appellant Rickels' annual leave status and its obvious error in computing his deadline date, it did not afford Mr. Rickels an opportunity to return to work after his oral reply. Accordingly, I find that the agency has not shown by a preponderance of the evidence that appellant Rickels participated in a strike on August 13, 1981, and the charge is not sustained.

In a case not materially different from that of appellant Rickels, Appellant Alan Lamden also claims that he was precluded from reporting for duty on August 11, 1981 following a period of approved leave and regular days off. The parties agree that prior to August 3, 1981 Mr. Lamden was scheduled for a regular day off on August 3, annual leave on August 4 through 8, 1981, and regular days off on August 9 and 10, 1981. (Agency response to petition, Tab 4, position assignment forms dated August 4 through August 8, 1981; and Tr. 257 and 258). I find that on August 9, 1981 the agency placed him in a non-pay, non-duty status, effectively locking him out of the Minneapolis Center after it issued on that date his first letter of proposed removal. The initial notice, received by appellant on August 10, 1981, charged him with strike participation and absence without leave from August 4, 1981 through August 9, 1981. On August 14, 1981 a second letter proposing appellant's removal was issued by Mr. Ciancanelli containing the same charge but cancelling the first letter to correct a statutory citation. (*See* Agency response to petition, Tab 1). The record further reflects that in an oral reply on August 26, 1981 appellant Lamden and his representative advised the agency of his annual leave status. (Agency response to petition, Tab 2, written summary of oral response). Thereafter,

the agency expressly cancelled its second notice of proposed removal in a third letter of proposed removal, dated September 11, 1981, charging him with strike participation and absence without leave beginning on August 11, 1981. (Agency response to petition, Tab 1).

My review of the record finds both unpersuasive and immaterial Mr. Ciancanelli's and Mr. Donnelly's testimony that appellant Alan Lamden's annual leave from August 5 through August 8, 1981 was cancelled on the evening of August 4, 1981. (Tr. 259 and 402). I find that Mr. Ciancanelli's third letter of proposed removal to Mr. Lamden, dated September 11, 1981, establishes that he agreed on that date that appellant's next regularly scheduled shift (deadline shift) following initiation of the strike on August 3, 1981 and appellant's schedule of approved leave and regular days off was August 11, 1981, as specifically cited in that letter. As noted, issuance of this letter expressly cancelled charges in two previous letters of proposed removal to Mr. Lamden covering the August 5, 1981 date now alleged by Mr. Ciancanelli to constitute appellant's deadline shift under the President's amnesty statement. Mr. Ciancanelli failed to offer any explanation at all for issuing the charges contained in his September 11, 1981 letter, for failing to issue a charge letter properly specifying the date he presently claims Mr. Lamden should have first reported for work, or for expressly relying on the charges contained in the September 11, 1981 notice in his decision letter of September 23, 1981 to appellant. (Tr. 260, 261 and 271). Under these circumstances I find that the agency has not established that appellant Lamden was striking or charged with striking from August 3 through August 10, 1981. Mr. Lamden cannot be charged with strike participation on August 11, 1981, a day the agency agreed he would not have been permitted to work

after it issued his first notice of proposed removal. *Ketchem*, at 9. Moreover, for the reasons set forth above concerning appellant Rickels, I find no material difference between the circumstances of Mr. Lamden's case and that of Mr. Machnik who was afforded an opportunity to return to duty after explaining at his oral reply why the agency miscalculated his deadline date. No evidence or testimony was offered to show why the agency did not afford Mr. Lamden the same opportunity to return to work following his oral reply. Accordingly, I find that the agency's charges as contained in its third and final notice of proposed removal to the appellant, and as relied upon in Mr. Ciancanelli's determination letter of September 23, 1981 (agency's response to petition Tab 3), are not established by a preponderance of the evidence and are not sustained.[6]

The fact situation in the case of appellant Nancy Lamden, which is identical to that of her husband, Alan Lamden, considered above, presents a more persuasive case for reversal because the agency made no attempt to contact her directly to confirm the alleged cancellation of her annual leave. Mr. Ciancanelli agrees that Mrs. Lamden was previously scheduled for regular days off and annual leave from July 28, 1981 through August 10, 1981. (Tr. 654). Appellant brought this fact to the attention of the oral reply official in her case, Mr. Len Berg, on August 24, 1981, who stated in his summary of her oral response, "Annual Leave was not cancelled with

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[6] Appellant Alan Lamden did not personally testify pursuant to my order at the outset of the hearing. In view of the above findings, it is my determination that taking an adverse inference with respect to the testimony sought from this appellant would not lead to a contrary result. Accordingly, I have not imposed any sanctions against Mr. Lamden under 1201.43(a) of the Board's regulations for failure to comply with said order.

Nancy for that period of time." (Agency response to petition, Tab 2; Oral response summary dated August 24, 1981). The agency failed to produce Mr. Berg to explain his reasons for making this otherwise unambiguous statement. My review of the record finds unpersuasive Mr. Ciancanelli's testimony that Mrs. Lamden's leave was cancelled effective August 5, 1981, for the following reasons: 1) Assistant Center Chief Donnelly admits that he did not request to speak with Mrs. Lamden when he telephoned Mr. Lamden on the evening of August 4, 1981 to allegedly advise Mr. Lamden of the cancellation of his and his wife's leave, and does not know whether Mrs. Lamden was ever told that her leave was cancelled (Tr. 402-405); 2) I find that the agency agreed, as shown by its proposed letter of September 11, 1981, and reconfirmed in it's decision letter of September 23, 1981 to Mr. Lamden, that Mr. Lamden's leave, for whatever reason, remained uncancelled notwithstanding Mr. Donnelly's telephone call to him on the evening of August 4, 1981. The agency failed to provide any rationale for relying on Mr. Donnelly's purported indirect communication to Mrs. Lamden in the same telephone conversation as its sole basis for claiming Mrs. Lamden's leave was properly cancelled; 3) The uncontroverted testimony of Mrs. Lamden establishes that she did not learn of Mr. Donnelly's telephone call to her husband until after her receipt of the agency's first notice of proposed removal on August 9, 1981 (Agency response to petition, Tab 1; and Tr. 655, 658-659); 4) While at first glance it is seemingly incredible that a message left for communication through one's spouse might be withheld from its intended recipient, in the instant circumstances I do not find reasonable the agency's reliance on an alleged message left with an employee whose professional or personal interests might differ from those of his wife, when

the wife was available to receive the message directly from the agency's representative. In this case Mrs. Lamden has consistently testified, at her oral response and before the Board, that her leave was not cancelled and that she was not apprised of Mr. Donnelly's alleged cancellation of her leave prior to receipt of her first notice of proposed removal (Tr. 656, 661 and 666-669).

I therefore find that appellant Nancy Lamden's deadline date, pursuant to the agency's deadline shift policy, was August 11, 1981, her first regularly scheduled shift following completion of previously approved and uncancelled annual leave and regular days off. I further find that Mrs. Lamden was precluded from reporting for duty on her deadline date by virtue of the agency's issuance of the first of three notices of proposed removal to her beginning on August 5, 1981, on which date she was placed in non-duty, non-pay status effectively locking her out of the Minneapolis Center. (Mr. Ciancanelli, Tr. 63). Appellant cannot be charged with withholding her services on days she was on approved leave of absence or on days when she would not have been permitted to work. *See Ketchem*, at 9. I do not find material Mrs. Lamden's admission that she picketed for two reasons: 1) such activity occurred during a period when she was under one or more erroneous notice(s) of proposed removal; or 2) such activity occurred during a period when Mrs. Lamden was appropriately on annual leave. Under these circumstances, the agency has failed to demonstrate appellant Nancy Lamden's participation in the strike, as charged, on August 5, 1981. Accordingly, I find that the agency has not shown by a preponderance of the evidence that appellant Nancy Lamden participated in a strike and the charge is not sustained.

None of the other 79 appellants in this consolidated proceeding elected to offer rebuttal to the agency's charges. Accord-

ingly, I find that these 79 appellants have failed to rebut the agency's *prima facie* showing that they participated in the PATCO strike on or before their deadline dates. Therefore, I find that a preponderance of the evidence supports the agency's charges that these 79 appellants so participated and the charges are sustained against each.[7]

As noted above, the agency also charged each appellant with being absent without leave (AWOL). Certain appellants in the consolidated group are charged with AWOL only for the day of their deadline shifts while others were charged with AWOL for the day of their deadline shift as well as for days missed earlier in the strike. Evidence adduced by the agency in support of its charge of strike participation is clearly relevant and material to the lesser charge of AWOL during the period of the PATCO initiated strike.

With the noted exceptions of appellants Dean Rickels, Nancy Lamden and Alan Lamden, the fact of appellants' absences and their AWOL status during those days for which they were charged is established by the testimony of Mr. Ciancanelli and agency witnesses cited in the decision appendix; or by documentary evidence submitted by the agency in response to appellants' petitions, i.e., the pertinent Position Assignment Forms, . . .

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[7] Board regulations found at 1201.43(a) and (b) provide that sanctions may be imposed for failure to comply with an order of a presiding official and for failure to prosecute and defend an appeal. I have not imposed sanctions against appellants represented by the "MSPB Council" for their failure to testify or answer questions in these consolidated proceedings. Nor have I imposed sanctions against *pro se* appellants Brickley, Capetz, Finn, Koerner, Pfister, Lloyd, and Maier for failing to appear or testify.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
BOSTON REGIONAL OFFICE

BN075281F0241

ROBERT E. BAKER, et al.

v.

FEDERAL AVIATION ADMINISTRATION

INITIAL DECISION NO.: SEE APPENDIX A
Date: February 1, 1983.

INTRODUCTION

Appellants whose names are listed in Appendix A (attached) appealed their removal by the Federal Aviation Administration, Boston Air Route Traffic Control Center (hereinafter Boston Center), Nashua, New Hampshire. In addition, appellants effectively amended their petitions on May 3, 1982, to include an appeal from an alleged suspension during the period between the issuance of their notices of proposed removal and the effective date of their removal as stated in their dismissal letters.

JURISDICTION

Appellants are entitled to appeal their removal in accordance with 5 U.S.C. 7513(d) and 7701(a) on the basis that they were employees as defined in 5 U.S.C. 7511(a)(1)(A) and the action is one which is covered by 5 U.S.C. 7512.

THE REMOVAL

By letters addressed to each appellant, Mr. James I. Lucas, Chief, Air Traffic Division, New England Region, Federal

Aviation Administration, proposed their removal for the following reasons:

1. Participation in a nationwide strike by air traffic controllers which began at 7:00 a.m. on August 3, 1981.

2. Unauthorized absence from scheduled tours of duty which began on or after 7:00 a.m. on August 3, 1981.

Appellants were given a shortened notice period of seven calendar days (the customary notice period is 30 calendar days) and the same time in which to reply to the proposal orally and in writing. With virtually no exceptions, appellants wrote to Mr. Lucas shortly after receipt of this proposal and requested an extension of time, citing several reasons. Appellants requested therein that the FAA provide them with a copy of all materials relied on by the agency to support its proposed action and also requested an opportunity to present an oral reply. By another letter, in most cases dated the same day as the request for an extension of time, appellants filed a written reply which constituted a general denial of the charges. Further, appellants indicated that they were submitting this reply in the event their request for an extension of time was not granted.

In letters which followed soon thereafter, Mr. Lucas denied their requests for an extension of time and informed each appellant of the date and time his oral reply was scheduled to be heard. Subsequently, with few exceptions, appellants submitted written withdrawals of their request for an oral reply and repeated their general denial of the charges. The FAA then issued written decisions to remove appellants, signed by either Mr. Lucas or Mr. Laurence O. Higgins. These decision letters also informed appellants that both charges were sus-

tained. Appellants timely appealed their removal to the Merit Systems Protection Board (hereinafter Board).

In an adverse action case before the Board, an agency must prove its charges against an employee by the preponderance of the evidence. 5 U.S.C. 7701(c)(1)(B); 5 CFR 1201.56(a)(1). This is defined as "that degree of relevant evidence which a reasonable person, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true."

First, I turn to the latter charge, unauthorized absence (AWOL) from scheduled tours of duty which began on or after 7:00 a.m. on August 3, 1981. Mr. Ray German, Assistant Chief, Boston Center, testified that he reviewed the agency's records covering the time in question and that, based on this review, these records reflect that none of the appellants reported for their scheduled tour of duty which began on or after 7:00 a.m. on August 3, 1981. The records which Mr. German reviewed included the agency's basic watch schedule, appellants' time and attendance cards and sign in/off logs which were the basic source documents for the time and attendance cards. Tr. at 28-35; Agency Exhibit A.

The record reflects that pertinent copies of this material were contained in the agency's response to each appellant's petition for appeal.

In addition, all of the supervisors who sat at the "watch desk" from August 3 through 10, 1981, testified that, to their knowledge, none of the appellants who were assigned to work in the control room reported for work on their scheduled shifts after 7:00 a.m. August 3, 1981. Tr. at 91, 92, 104, 137, 139, , , 238.

Appellants did not attempt to directly introduce evidence. However, appellants alleged that they were on previously scheduled annual leave during the first weeks of August, 1981. These appellants presented unrebutted testimony that their leave was scheduled as follows:

Robert E. Baker, Jr.	8/3/81 through 8/7/81
Richard L. Borges	8/3/81 through 8/7/81
Peter S. Bowman	8/3/81 through 8/6/81
Gary E. Crisp	8/7/81 through 8/17/81
Gerald A. Dea	8/3/81 through 8/7/81
Ferdinand K. Englehardt, Jr.	8/3/81 through 8/13/81
Thomas P. Gately	7/30/81 through 8/15/81
Steven R. Lenney	8/3/81 through 8/7/81
William J. McGowan	8/3/81 through 8/13/81
Raymond Nuzzolo	7/31/81 through 8/9/81
George W. Pelletier	8/3/81 through 8/5/81
Ronald J. Peters	8/7/81 through 8/11/81
Robert J. Phillips	8/3/81 through 8/4/81
William E. Ratte	8/2/81 through 8/13/81
Arthur P. Rockwell	8/4/81 through 8/28/81
Lawrence Weinberg	7/28/81 through 8/8/81
Henry A. White	7/31/81 through 8/10/81

Tr. at 330-333, 550, 585-586, 808, 874-875, 997, 1072-73, 1511; Agency Response To Appellant Bowman's Appeal, Item 6; Agency Response to Appellant Phillips' Appeal, Item 6. Based on the foregoing, I find that the listed appellants' leave was scheduled as set forth above.

g. Gary E. Crisp and Ronald J. Peters

Both appellants Crisp and Peters were charged with unauthorized absence on August 3, 4 and 7, 1981. Both appellants had scheduled leave to begin on August 7, 1981, their deadline shift. Appellant Peters' leave was scheduled to expire on August 11. Appellant Crisp's leave was scheduled to expire on August 20. (Appellant Crisp's regular days off were August 18 and 19). Both appellants admitted they were on strike August 3 and 4, 1981. Tr. at 601, 815, 816. However, in neither case did the agency present any evidence to show that their annual leave scheduled to begin on August 7, 1981 had been cancelled. The records reviewed by Mr. German do not contain any notation that the leave of either individual had been cancelled. *See* Appellant's Exhibit QQ. Further, Mr. German acknowledged that the agency only attempted to contact those controllers whose leave was scheduled on August 3, 4 and 5, 1981. Tr. at 36. Both appellants denied receiving any notice that leave had been cancelled or that they had requested that it be cancelled. Tr. at 586, 809. Both appellants received letters of proposed removal on August 10, 1981, during the period of time covered by their scheduled annual leave. *See* Agency Response to Appellant's Petitions for Appeal, Tab No. 2.

In addition, appellant Crisp testified, with no rebuttal offered by the agency, that at approximately 6:00 a.m. on August 3, near the completion of his midnight shift, he asked his immediate supervisor, James Stokes, if his annual leave scheduled to begin on August 7, 1981 had been cancelled. He testified that Mr. Stokes told him it had not. He explained that Mr. Stokes did say it was unusual because in June of the same year, before a strike threatened to begin on June 22, the

agency had cancelled everyone's leave before the deadline. He also testified that he called Mr. Stokes on August 10, 1981. He said that Mr. Stokes was surprised to hear from him because he had planned to go out to Indiana on vacation. He testified that he told Mr. Stokes that he was waiting around for the strike to end. He said that Mr. Stokes responded "no, you don't have to worry about being fired because you're on annual leave and that won't come about until after August 20 after your annual leave is terminated". Tr. at 18.

The testimony of appellants Crisp and Peters was direct, candid and credible in all respects. Thus, based on the foregoing, I find it more probable than not that the agency did not properly notify appellants that their leave scheduled to begin on August 7, 1981 was cancelled. Thus, the charge of unauthorized absence on August 3 and 4, 1981 is sustained, based on their own admissions. However, the charge of unauthorized absence against them on August 7, 1981 is not sustained.

h. *Robert Baker et al.*

Robert Baker, Richard Borges, Fred Englehardt, Steven Lenney, Gary Pelletier, William Ratte, Arthur Rockwell and Lawrence Weinberg all stipulated that their leave was cancelled under the procedure described by Mr. German. Tr. at 1511. Therefore, I must conclude that the charges of unauthorized absence against them are sustained.

Next, I turn to the charge of participation in a strike in violation of 5 U.S.C. 7311. In order to prove that appellants participated in a strike the agency must show that they actually refused in concert with others to provide services to their employer. *Schapansky v. Department of Transportation, Federal Aviation Administration,* MSPB Docket No. DC075281F1136 (October 28, 1982); *Jones v. Tennessee Val-*

ley Authority, MSPB Docket No. AT07528010300 (February 19, 1982) ; *Duckett and Yardley v. Tennessee Valley Authority*, MSPB Docket No. AT07528010325 (February 19, 1982). Once the existence of a strike has been . . .

In addition, these briefings, individually and collectively, make clear that the FAA's manner of implementation was an adjustment made to reflect the round-the-clock nature of air traffic control and the demands of rotating shifts and days off. Upon review of Mr. Helms' and Mr. Lewis' statements I find that controllers accustomed to rotating shifts and days off more probably than not would have had little, if any, difficulty in understanding Mr. Lewis' and Mr. Helms' explanations. In any event, I cannot conclude that these statements, considered separately or together, were inherently confusing, whether one understands the vagaries of the basic watch schedule or not.

Accordingly, absent an affirmative showing by individual controllers that they were confused or mislead, this defense cannot prevail. Since none of the appellants have provided any evidence other than what has been discussed supra, to support a conclusion that any of them was confused or misled, I must conclude that the agency's prima facie case stands unrebutted. Therefore, the charge of participation in a strike is hereby sustained.

As I have sustained both charges against appellants, I must next determine whether the agency's selection of the penalty of removal was appropriate, with the exception of appellants Crisp and Peters. The agency bears the burden of persuasion on this issue. *Douglas v. Veterans Administration*, MSPB Docket No. AT075299006 (April 10, 1981) at 35, 36.

With respect to appellants Crisp and Peters there is no dispute that the agency has not terminated those controllers who

participated in the strike, but who did return to work on their first scheduled shift after 11:00 a.m. on August 5. *See PATCO v. United States Department of Transportation, supra*; *Schapansky* at 11. Further, there is no dispute that the agency has taken the position that where a controller's absence on his first scheduled shift after 11:00 a.m., August 5, 1981 was not unauthorized, no penalty should be imposed although he was AWOL on August 3, 4 or before 11:00 a.m., on August 5, 1981. *See Schwartz v. Federal Aviation Administration,* MSPB Initial Decision No. BN075281F0689 (September 16, 1982) at 6; *Starry v. Federal Aviation Administration,* MSPB Initial Decision No. BN075281F0722 (January 18, 1983) at 5. In view of the foregoing, and because the agency has been unable to prove that appellants Crisp and Peters participated in a strike on August 7, 1981, I hereby consider the charge of participation in a strike on August 3 and 4, 1981 withdrawn; *Id.* Thus, only the charge that appellants Crisp and Peters were absent on August 3 and 4, 1981 is sustained. However, since the agency has indicated that it imposed no penalty against others in similar circumstances, I find no penalty should be imposed in this case either. *Id.*; *Ramerez v. Department of the Air Force,* MSPB Docket No. DA075281010067 (December 2, 1981).

As to the remaining appellants (except White, against whom no charges were sustained), the agency argued that because 5 U.S.C. 7311(3) prohibits an individual from holding a position in the federal government if he participates in a strike against that government, the agency could not have selected a penalty other than removal and did not have to consider any mitigating factors. *Cf.* 5 U.S.C. 7513; *Douglas, supra.*

In contrast, appellants argued that despite 5 U.S.C. 7311 (3), the Board does have the authority to mitigate the penalty in these cases. Further, appellants argued that under the principles enunciated in *Douglas*, several potentially mitigating factors must be considered, including the following:

the employee's past disciplinary record;

the employee's past work record;

* * * * * *

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

IN THE MATTER OF:

Dennis Abarr	Decision Number: CH075281F0833
David Collins	Decision Number: CH075281F1260
Robert Connor	Decision Number: CH075281F1272
Steven Farraday	Decision Number: CH075281F1505
Donald Forys	Decision Number: CH075281F1567
Edward Garvin	Decision Number: CH075281F1626
Lester Green	Decision Number: CH075281F1689
William Heffern	Decision Number: CH075281F1795
Patrick Henry	Decision Number: CH075281F3375
Dwight King	Decision Number: CH075281F2051
Jeffrey Lowery	Decision Number: CH075281F2244
William McCormack	Decision Number: CH075281F2330
Richard Mack	Decision Number: CH075281F2268
Robert Mayes	Decision Number: CH075281F2318
William Merritt	Decision Number: CH075281F2382
Wayne Nuernberg	Decision Number: CH075281F2525
William Ottens	Decision Number: CH075281F2567
Scott Pfleghaar	Decision Number: CH075281F2628

William Reed Decision Number: CH075281F2707
John Tuszl Decision Number: CH075281F3157
Thomas Vaughn Decision Number: CH075281F3364
Howard West, Jr. Decision Number: CH075281F3255

v.

Department of Transportation
Federal Aviation Administration
Date: February 1, 1983

INTRODUCTION

By separate petitions timely filed in the Chicago Regional Office of the Merit Systems Protection Board (Board), the above-captioned appellants appealed from the action taken by the Department of Transportation, Federal Aviation Administration, removing each of them from their positions as air traffic control specialists. All of the above-captioned appellants worked at the Chicago Air Route Traffic Control Center, Aurora, Illinois (Aurora ARTCC). The appellants' removals became effective between August and October 1981. Each appellant seeks to have his removal action set aside. Their appeals were consolidated by an order entered on August 25, 1982.

* * * * *

Dwight King

In rebuttal to the agency's case, appellant King contended that he was locked out of the facility prior to his moratorium deadline of August 24, 1981. The appellant testified that he did not report for his scheduled 7:00 a.m. shifts on August 3, 4, and 5, 1981, and that he had advanced scheduled annual leave from August 6 through August 24, 1981. He further testified that he left on August 4 for a trip out West with his family which included picking up his six year old nephew in

Utah whose mother had recently died of cancer. Appellant stated that he had originally scheduled his vacation to coincide with his crew's projected work schedule with regular days off on August 4 and 5. He emphasized that the trip was extremely important to him and to his family and when he heard President Reagan's amnesty declaration on Monday he determined that he would be on annual leave on his deadline so that he would have until the end of his vacation (3:00 p.m. on August 24) to report back to work. (Tr: p. 1326). Appellant King returned home on August 18 or 19 to find his proposal notice dated August 10 charging him with strike participation beginning on August 3, 1981. Appellant King testified that he called his supervisor, David Harper, who told him to contact Chief Gunter. Mr. King then spoke with deputy chief French at some point prior to 3:00 on August 24. The essence of the conversation is set forth in Mr. French's memorandum:

> Dwight King asked what his next move was for re-employment. I told him that it was an oral and written response and to get an appointment for the response. I told him to be truthful with the interviewer in all particulars about his annual leave. He said he knew there was a strike going on and felt that he did not have to report until the final day of his annual leave.

(Agency File, Tab 2).

Mr. King stated that he had prepared a letter to submit at his oral reply explaining his actions but was told by a PATCO representative that all the agency would do would be to reissue the letter of intent to coincide with his actual deadline date after his leave so the appellant decided to say nothing of this defense. (Tr: pp. 1340-1341).

The agency contended in response that appellant's deadline shift was August 6 at 7:00 a.m. because his annual leave which

began on that date had been cancelled. Chief Gunter testified that he had been told by "word of mouth" that supervisor David Harper had cancelled appellant King's annual leave. Supervisor Harper testified that the week prior to the strike:

> I just advised Dwight that if there would be a strike that any annual leave that had been approved would be cancelled . . . He was advised that if there was a strike, he was to call in to the watch supervisor number prior to either 7:00 or 8:00 in the morning.

(Tr: p. 1177).

However, Mr. Harper stated twice that he did not at any point in time cancel Mr. King's leave, nor was he aware of anyone who did. (Tr: pp. 1179, 1195). Moreover, Robert Miller, the Evaluations Officer who signed the proposal letter, and deputy chief French admitted that appellant King's work records do not show cancellation of annual leave. (Tr: pp. 293, 364, 378). After reviewing the record evidence and particularly Mr. Harper's testimony, I find that King's leave was not in fact cancelled. Mr. Harper's directive was a general one regarding possible cancellation of annual leave in the event of a strike. While appellant certainly should have gone to work on August 3, at which point his leave would have been cancelled, he did not do so and his leave was not cancelled. The appellant was not charged with insubordination or failure to call in. I find that since appellant's leave was not cancelled, he should have been allowed to report on August 24, despite his AWOL on August 3, 4, and 5. In not permitting him to do so, the agency violated the terms of the President's moratorium policy. I find that the agency has not established by a preponderance of the evidence the propriety of its strike charge for the period of time cited in the proposed notice and I will therefore not give the charge further consideration.

Robert Connor

The record evidence in this case reveals that appellant Connor was issued a notice of proposed removal in which he was charged with striking and AWOL beginning on August 3 and thereafter. The letter of intent was issued August 4 and the charges therefore are limited to August 3 and 4, days on which the appellant was not scheduled to work. Appellant Connor had worked a midwatch ending at 8:00 a.m. August 3 and had a regular day off August 4. Chief Gunter admits the letter is in error on both specifications (Tr. p. 238). Appellant's deadline shift, according to Chief Gunter, was 3:00 p.m. August 6, 1981. Appellant and his wife both testified that the proposal letter had been received August 5, or 6, 1981.[9]

A second letter issued on August 14, voiding the August 4 letter, also contained the same incorrect specifications. In this case the second notice could not have effectively amended the August 4 letter anyway because, as previously noted, appellant would not have been permitted to . . .

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

IN THE MATTER OF:

Richard S. Andrews	Decision Number: CH075281F0890
Melvin Berg	Decision Number: CH075281F0992
Kenneth Bruck	Decision Number: CH075281F1113

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[9] The appellant states he received the letter "Thursday, August 5" and his wife stated he received it August 5. The date specified in the appellant's appeal petition is August 11, the date the certified letter was received.

Timothy P. Clouser	Decision Number: CH075281F1243
Brenda Conroy	Decision Number: CH075281F1273
Dorothy Davis	Decision Number: CH075281F1350
Philip J. DeMar	Decision Number: CH075281F1364
Frank W. Doyle	Decision Number: CH075281F1418
John W. Gorman	Decision Number: CH075281F1670
Louis W. Hamer	Decision Number: CH075281F1741
Paul L. Jordan	Decision Number: CH075281F1980
Robert J. Klein	Decision Number: CH075281F2071
Thomas Koontz	Decision Number: CH075281F2098
Raymond LaBoda	Decision Number: CH075281F2137
Michael C. Lacy	Decision Number: CH075281F2140
Kenneth E. Lesiak	Decision Number: CH075281F2199
Jonathan Lowry	Decision Number: CH075281F2245
Joseph F. Meehan	Decision Number: CH075281F2371
Betty J. Murphy	Decision Number: CH075281F2465
Glenetta R. Nicholas	Decision Number: CH075281F2502
Dennis P. Obremski	Decision Number: CH075281F2545
Donal O'Grady	Decision Number: CH075281F2538
Alan L. Reilly	Decision Number: CH075281F2715
Darryl Romashko	Decision Number: CH075281F2786
Jack B. Shaul	Decision Number: CH075281F2928
James E. Simms	Decision Number: CH075281F2940
Daniel C. Staffin	Decision Number: CH075281F3008
Oscar L. Taylor	Decision Number: CH075281F3087

v.

Department of Transportation
Federal Aviation Administration

Date: February 1, 1983.

INTRODUCTION

By separate petitions timely filed in the Chicago Regional Office of the Merit Systems Protection Board (Board), the above-captioned appellants appealed from the action taken by the Department of Transportation, Federal Aviation Administration, removing each of them from their positions as air traffic control specialists. All of the above-captioned appellants worked at the Chicago Air Route Traffic Control Center, Aurora, Illinois (Aurora ARTCC). The appellants' removals became effective between August and October 1981. Each appellant seeks to have his removal action set aside. Their appeals were consolidated by orders entered on October 14, October 25, and November 4, 1982.

JURISDICTION

The appellants, employees in the competitive service who have each completed more than one year of current continuous service in the same position, are entitled to appeal their removal actions to the Board. *See* 5 U.S.C. 7511(a)(1)(A), 7512 and 7513(d) (1980); and 5 C.F.R. 752.401(a), and .401(b)(1), and .405(a) (1981).

ANALYSIS AND FINDINGS

When an employee appeals an adverse action to the Board, the Board must review the action to determine whether the underlying cause for the action actually occurred, and if it did occur, the Board must next determine whether the disciplinary action taken will promote the efficiency of the service. 5 U.S.C. 7701(c)(1)(B), 7513(a) (1980); 5 C.F.R. 1201.56(a) (1981). In addition, the Board is required to review and consider any affirmative defenses raised by an appellant which are based on harmful procedural error, prohibited personnel practices or violations of law. 5 U.S.C. 7701 (c)(2) (1980); and 5 C.F.R. 1201.56(b) (1981).

In each of these cases, the appellants were advised of a proposal to remove them on the basis of two charges: (1) violating 5 U.S.C. 7311 (1980), which bars government employment for an individual who participates in a strike, and 18 U.S.C. 1918 (1980) which makes participation in a strike against the government a crime for which a sentence of imprisonment can be imposed; and (2) unauthorized absence on specified dates during an illegal strike. The agency, in its decision notices, found that its charges warranted removing the appellants from their positions.

Strike Participation Charge

With regard to the charge of striking, a strike occurs when employees, in concert with each other, refuse to provide services to their employer. *United Federation of Postal Clerks v. Blount*, 325 F. Supp. 879 (D.D.C.), *aff'd.* 404 U.S. 802 (1971); *Tennessee Valley Authority v. Bailey*, 495 F. Supp. 711 (E.D. Tenn. 1980); *Schapansky v. Department of Transportation*, MSPB Docket No. DA075281F1130, at 6, n. 3 . . .

. . . contingency plan for the anticipated June 1981 walkout. (TR: pp. 1335, 1375). Appellant further testified that his wife had a complicated delivery requiring her to stay in the hospital five days (until Monday, August 10), that he visited her every day, and that after she returned home he assumed most of the household responsibilities for a period of time, including the care of their one year old son. Although appellant said he had told his immediate co-workers and supervisory personnel at the Center in July that he would be taking emergency annual soon, he testified that he unsuccessfully attempted to call the West Terminal Area desk at the Center on August 3, prior to 3:00 p.m. and again on August 5, to request emergency annual leave. (TR: pp. 1329, 1335, 1357, 1359). After August § 5 he no longer tried to reach the facility because he thought he was fired.

With respect to appellant's absence on August 3, I do not find appellant Romashko adequately advised the agency that he would not take the overtime assignment. It does not appear that his supervisor took appellant's remark seriously, and in any case appellant had the responsibility of finding someone to take the shift if he was not prepared to work.

I also find that the appellant has not established a rebuttal defense of emergency leave and for his deadline shift on August 6. The appellant failed to exercise due diligence in contacting the facility on August 5 or 6 either to request emergency annual, to advise the Center of his situation or to confirm his status. He placed only two calls to the facility, did not try an alternate number, or drive to the facility. Moreover, I find that there was not a facility lockout on August 5, as previously discussed. I therefore find that appellant was properly charged in his letter of intent, that he has not rebutted the agency's *prima facie* case, and the agency's strike charge is supported and sustained by a preponderance of the evidence.

Kenneth Bruck

This appellant was issued a notice of intent on August 10, charging him with striking and AWOL beginning on August 6 at 3:00 p.m. Chief Gunter admitted that the appellant was on uncancelled annual leave at that time and that the notice was a mistake. (TR: p. 207). The appellant's actual deadline shift, after his annual leave ended, was August 12, 1981 at 7:00 a.m. (TR: p. 207) and the agency correctly charged him with this date in a second proposed removal notice issued September 16.

The appellant and his wife testified that the regular mail copy of the August 10 notice was received on August 11, and the certified copy on August 12. (Transcript of December 27, 1981 at pp. 119, 122). Appellant Bruck testified that after he received the letter he did not attempt to contact the facility or

return on his deadline date of August 12 because he knew that once a proposal letter was issued, a controller was not permitted to report for duty. (TR: December 27, 1982, p. 122). Chief Gunter testified that if the appellant had communicated with the Center and had reported for work on August 12 and he had time to verify that appellant's leave had not been cancelled, he would have been allowed to work. (TR: p. 212). On cross-examination, however, he admitted that air traffic controllers who received notices of intent were not permitted to work and had to go to an oral reply (TR: p. 215), and that at the time the August 10 letter of intent was issued he had been under the erroneous assumption that appellant's leave had been cancelled. (TR: p. 219).

I find that appellant would not have been permitted to return to work on August 12, 1981 at 7:00 a.m. I also find that the appropriate test in evaluating an appellant's strike participation is whether an appellant was scheduled and would have been permitted to work for the time he is charged with striking. An appellant cannot be charged with withholding his services on a day when he would not have been permitted to work or on days on which he had received approved annual leave. Accordingly, I find that the agency has not established its striking charge with respect to the appellant and I will not give it further consideration.

Brenda Conroy

My review of the evidence of record indicates that this appellant was scheduled to work on August 3 at 8:00 a.m., on August 4 at 7:00 a.m. and again on August 4 at 11:00 p.m. continuing until 7:00 a.m. on August 5, and on August 5 at 11:00 p.m. and that she did not work and was not excused for these shifts. (TR: p. 860). Appellant Conroy claims that she felt compelled to conform with the union because PATCO's influence was so pervasive at the facility. She testified that

PATCO was very powerful especially as the strike approached and that even the agency's supervisors encouraged strike support. (TR: December 27, 1982, pp. 159-60). She further testified that she received phone calls in the middle of the night from PATCO members, claiming they wanted to "educate" her. (TR: December 27, 1982, p. 161).

The appellant testified that she was confused and apprehensive on August 3. (TR: December 27, 1982, p. 187). On August 4, she heard that the President had fired all controllers. Although she testified that she was confused, she did not attempt to clarify her status with the facility, but instead relied only on advice from the union. (TR: December § 27, 1982, pp. 198-99). The appellant testified that she did not picket during August, 1981, but admitted that she did make coffee for the picketers on August 3. (TR: December 27, 1982, p. 196).

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

Decision No. AT075281F1693

IN THE MATTER OF:

ROGER O. MOORE,[1]

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,

Agency.

---

[1] This case was heard with the cases of Leroy Taylor and Joshua Thorner.

Date: January 11, 1983.

INTRODUCTION

This appeal was heard in Atlanta, Georgia on November 2 and 3, 1982. The appellant was represented by A. Lee Parks, Jr. The agency was represented by Jerry William Hacker. Mr. Moore appealed his removal from the position of Air Traffic Control Specialist with the Federal Aviation Administration at the Atlanta Air Route Traffic Control Center located in Hampton, Georgia. The removal was based on the charges that he participated in a strike against the Government of the United States from August 3, to August 17, 1981, and that he was absent without authorization during that time period.

JURISDICTION

This action is governed by the provisions of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111. The Board has authority pursuant to the Reform Act to hear and adjudicate all matters within its jurisdiction as provided by law, rule or regulation. 5 U.S.C. § 1205(a)(1). At the time of his removal, appellant was an employee as defined by 5 U.S.C. § 7511(a)(1)(A), and the action is one which is covered by 5 U.S.C. § 7512. Accordingly the appeal is within the appellate jurisdiction of the Merit Systems Protection Board. 5 U.S.C. § 7513(d).

ANALYSIS AND FINDINGS

The removal of appellant arose out of the events surrounding the strike by air traffic controllers against the Federal Aviation Administration beginning on August 3, 1981, at 7 a.m. The appellant was charged with violation of 5 U.S.C. § 7311 which states, in pertinent part, that "[a]n individual may not . . . hold a position in the Government of the United States . . . if he participates in a strike against the Government of the United States. . . ."

The agency has the burden to prove by a preponderance of the evidence that the action was properly taken. 5 U.S.C. § 7701(c)(1)(B). In addition to proving the charges against appellant, the agency must also establish that the action was taken for such cause as will promote the efficiency of the service. 5 U.S.C. § 7513(a); *Bonet v. U. S. Postal Service,* 661 F.2d 1071 (5th Cir. 1981). In making a determination on this issue it must be decided whether there exists a rational relationship between the grounds for the adverse action and "the efficiency of the service", and whether the particular penalty promotes the efficiency of the service. *Douglas v. Veterans Administration,* MSPB Dkt. No. AT075299006 at 28-29 (April 10, 1981).

It was stipulated that: a strike by air traffic controllers began on August 3, 1981; Mr. Moore was absent from the facility on the dates charged; and he was a member of PATCO. On the morning of August 3, the President announced that if air traffic controllers did not return to work within 48 hours they would "have forfeited their jobs" and would be terminated. Agency Exhibit 5; *Ketchem v. Department of Transportation,* MSPB Dkt. No. DA075281F07138 at 6 (May 28, 1982). This 48-hour deadline was interpreted by the agency to allow a controller to return to his first regularly scheduled shift beginning on or after 11:00 a.m., on August 5. General Notice (GENOT) 128 and 130. It was stipulated that if a controller returned within the deadline, he would be allowed to return to work regardless of his activities.

The parties further stipulated that the appellant had received approval for annual leave or had regular days off scheduled August 4-19. It was also stipulated that Mr. Moore's first regular scheduled shift after August 5, was August 20. It was further agreed that Mr. Moore was never contacted

personally by the Federal Aviation Administration during the relevant period, and that the agency issued the proposal of removal on August 17, 1981. Significantly, it was stipulated that Mr. Moore did not report for work on August 3 because he feared his leave would be cancelled.[2]

In addition to the above stipulations, I find that Mr. Moore was aware of the strike since he attended the union meeting in the early morning hours of August 3. Mr. Moore denied that he was aware of the facility order on July 30 which cancelled leave in the event of a strike. I find to the contrary, however. The facility order was put in the "read binder" and I find that Mr. Moore was aware of that order. Controllers are required to acquaint themselves with the materials in the read binder.

On August 3, Mr. Moore left the Atlanta area and went to Connecticut where his children were staying with their grandparents. Mr. Moore was divorced and had sole custody of his children. He had sent them to their grandparents for the summer since he had no other child-care arrangements.

When Mr. Moore arrived in Connecticut, he heard the President's speech. He later heard Drew Lewis explain that controllers could report as late as their next scheduled shift after the presidential deadline. He interpreted that to mean that he could report as late as August 20 at 7:45 a.m. This interpretation is correct.

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[2] In the Agency's Post-hearing Brief, Mr. Hacker argued that Mr. Moore missed the shift on August 3 because he was participating in the strike. While Mr. Moore's explanation for his failure to report on August 3 might not be credible as the agency argues, the agency stipulated to his explanation as a fact in this case. (Tr. 166). Since the agency agreed to the stipulation and did not offer any correction as to how it was read into the record (Tr. 167), the agency can not now attack the factual stipulation.

On the 17th of August he returned to Atlanta with the intention of returning to work. On the 18th of August he received the proposal of removal. He was aware that other air traffic controllers who received proposals of removal were not allowed to return to work. This also was true as it was the agency policy as set forth in GENOTs. The appellant supported the union and picketed after receiving the proposed removal.

"Strike" as used in 5 U.S.C. § 7311 and 18 U.S.C. § 1918, has been defined to mean "[a]n actual refusal in concert with others to provide service to one's employer." *United Federation of Postal Clerks v. Blount,* 325 F. Supp. 879, 884 (D.D.C.) *aff'd,* 44 U.S. 802 (1971). Once an employee is locked out and would not be allowed to return, the element of the withholding of services to the employer is no longer present and that person cannot be considered to be participating in a strike. *United States v. Professional Air Traffic Controllers Organization,* 524 F. Supp. 60, 164 (D.D.C. 1981); *Tennessee Valley Authority v. Bailey,* 495 F. Supp. 711 (E.D. Tenn. 1980). Upon consideration of the evidence and for the reasons discussed below, I conclude that the agency has failed to prove that Mr. Moore participated in the strike for the period of time in question. Further, I conclude that even if the appellant had been participating in the strike, the agency decision could not be sustained.

The agency proved that the appellant was absent during the period of August 3 through August 17. The agency stipulated that he was absent on August 3 because he feared that his leave would be cancelled. I find the evidence as to his reason for traveling to Connecticut to be credible and persuasive.

Thus, I find that Mr. Moore was absent due to his desire to go to Connecticut as planned. The agency has attempted to

bolster its case by showing that the appellant was a supporter of PATCO and that he picketed after receiving his letter of proposed removal. While evidence of support for PATCO before the strike and of participation in picketing activities after a person has been locked out are relevant to the charge of strike participation, such actions are not improper. *See Blount, supra.* In this case I find that appellant picketed after receiving the proposal because he thought the Federal Aviation Administration had acted unfairly in his case. Such picketing does not prove that he was on strike during the period August 3-17. Consequently, I conclude that the agency has not proven by a preponderance of the evidence that appellant participated in a strike.

Even if I were to find that the appellant had been participating in a strike during the period August 3-17, this action could not be sustained. It is uncontroverted that all controllers were given a moratorium, and that if they returned within their deadline no disciplinary action was to be taken. The agency did not extend the full moratorium period to appellant.

The agency's attorney argues that despite the agency's action, the appellant should have called the agency and convinced them that the proposed removal was contrary to agency policy. I do not find that the appellant had any such obligation to do so. Even if he should have taken such an action, his failure to do so does not change the fact that the charges against him are for the moratorium period only.

Mr. Denley, the deciding official, admitted that the proposed removal should not have been sent on the 17th. The agency attempts to minimize this error by arguing that appellant would have been allowed to return on August 20 even though the letter had been issued. Unfortunately, this was

never communicated to appellant at the time and he cannot be held responsible for the agency's action which deprived him of the moratorium period announced by President Reagan and implemented by the Federal Aviation Administration.

Similarly, although the agency has proved that the appellant was absent without authorization during the period charged, the charge itself is contrary to the agency policy in respect to the moratorium. The moratorium not only allowed striking controllers to return to work without discipline, but was also interpreted to mean that those who returned would not be disciplined for their absence. Therefore, to be consistent with what was an unequivocal agency policy, no discipline would be appropriate.

To summarize, I find that the agency has not proved that the appellant was participating in the strike. Even if it had, this action could not be sustained since the appellant intended to report by his deadline but was not afforded the grace period extended to all other controllers by President Reagan. Thus, to give effect to the agency's policy, Cf. *Giesler v. Department of Transportation*, 3 MSPB 367, 368 (1980), no discipline should be imposed for striking or AWOL since appellant would have returned by the deadline.[3]

DECISION

The agency decision is not sustained. The agency is ORDERED to take appropriate corrective action and to supply this office with copies of the corrective action within five (5) days after this decision becomes final.

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[3] The agency's failure to give the full moratorium period to appellant might alternatively be analyzed as a procedural error. Under such a view, I would conclude that the error affected the agency's decision since I concluded above that Mr. Moore would have returned. I believe, however, the better view is to view the moratorium as a substantive matter.

BEST

NOTICE

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on Feb. 15, 1983, unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party seeking enforcement of a final decision of the Board may file a petition for enforcement with the regional office that rendered the initial decision. Such petition should be directed to the Regional Director and must comply with the requirements of 5 C.F.R. § 1201.181(a).

Any party to the proceeding, the Director of the Office of Personnel Management, and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The petition for review must set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record.

The petition for review must be filed with the Secretary of the Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419, no later than the date set forth above.

After providing an opportunity for response by other parties, the Board may grant a petition for review when it is established that:

(a) New and material evidence is available that, despite due diligence, was not available when the record was closed;

(b) The decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

Pursuant to 5 U.S.C. § 7703(b)(1),[1] the appellant has the right to seek judicial review of the Board's final decision on

[1] As modified by § 127 of the Federal Court Improvement Act of 1982, to be codified at 28 U.S.C. § 1209(a)(9).

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this appeal. A petition requesting such review must be filed with the U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20005, no later than 30 days after appellant's receipt of the Board's final order or decision.

For the Board:

D. KEVIN DUGAN
Presiding Official